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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 704

T. LAMAR CAUDLE, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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February 12, 1960

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner T. Lamar Caudle prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on November 9, 1959. A separate petition for a writ of certiorari is being filed simultaneously herewith by Matthew J. Connelly, who was petitioner's co-defendant and co-appellant in the courts below.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 271 F. 2d 333. It is reprinted in the joint appendix filed by petitioner Caudle and petitioner Connelly, App. 92-98.*

The opinion and order of the District Court are unreported, but are reprinted in the joint appendix, App. 76-91.

JURISDICTION

The judgment of the Court of Appeals was entered on November 9, 1959. App. 9. A petition for rehearing filed by petitioner Caudle was denied on December 14, 1959. App. 100-101. On December 29, 1959, Mr. Justice Black signed an order extending the time for filing this petition for a writ of certiorari to and including February 12, 1960. App. 101. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, a motion for a new trial on grounds of newly discovered evidence having been filed under Rule 33 of the Federal Rules of Criminal Procedure, it is proper to test the new evidence, found otherwise to be competent, relevant and admissible, by the requirement that the evidence be such as "would probably produce an acquittal" on a new trial.

2. Whether a court abuses its discretion and invades the exclusive domain of the jury by violently attacking the credibility of the witness whose testimony con-

* References to the joint appendix filed herewith by the two petitioners are designated by "App." The symbol "Tr." refers to the original trial transcript, which is also on file with the Clerk of this Court.

stitutes the newly discovered evidence on a new trial motion where (1) the evidence is otherwise found to be relevant, admissible and competent, (2) the witness has been charged with but not found guilty of crime, and (3) the judge has not seen the witness or presided at the original trial.

RULE INVOLVED

Rule 33, Federal Rules of Criminal Procedure:

> The Court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

STATEMENT OF THE CASE

Petitioner, having been convicted in 1956 of a conspiracy in violation of 18 U.S.C. § 371, filed a motion for a new trial on grounds of newly discovered evidence. That motion was denied and the action was affirmed on appeal. 271 F. 2d 333; App. 92. The instant petition is directed at the reliance on improper criteria and the gross abuse of discretionary power in the ruling on the motion. The denial of a similar motion by petitioner's co-defendant, Matthew J. Connelly, has given rise to a separate petition for certorari, filed by him simultaneously herewith.

These two petitioners were indicted for a conspiracy to defraud the United States of the proper administration of the internal revenue laws and of the proper and faithful service of these petitioners, all in violation of 18 U.S.C. § 371. Also indicted as a member of this conspiracy was Harry I. Schwimmer, a Kansas City attorney. The indictment alleged that the purpose of this conspiracy was to protect one of Schwimmer's clients, Irving Sachs, from indictment, prosecution and imprisonment for income tax fraud. And to achieve that purpose, said the indictment, Schwimmer promised and gave things of value to the two petitioners, who in turn corruptly influenced other government officials to drop the prosecution of Sachs.

Petitioners' convictions pursuant to this indictment were affirmed on appeal. See *Connelly* v. *United States*, 249 F. 2d 576 (C.A. 8); certiorari denied, 356 U.S. 921; rehearing denied, 356 U.S. 964. To the extent pertinent to the new trial motion filed by petitioner herein, the proceedings at the trial may be summarized as follows:

(1) About two weeks after the commencement of the trial, the defendant Schwimmer suffered a heart attack. A mistrial was declared as to him. Tr. 1486, 1535. He was removed from the case as a defendant and he never appeared as a witness. But a substantial body of evidence had already been introduced as to Schwimmer alone, including admissions of guilt. Petitioners objected that this evidence, despite its limitation as to Schwimmer, was so prejudicial to them that it could not be eradicated from the jury's mind, and that petitioners had been deprived of their right to cross-examine Schwimmer. Tr. 1535-47. But the motion for a mistrial as to petitioners was denied.

(2) The Government's case against the petitioners concededly "did not rest on the issue of the credibility of its witnesses but on the issue whether the inferences on which it relied to prove its case could validly be drawn from that uncontroverted body of proof."[1] This body of proof, in relation to Caudle, concerned two major categories of fact: (a) Caudle's determination, in the exercise of his duties as a government official, not to prosecute Sachs; and (b) Schwimmer's contacts with Caudle, particularly with reference to an oil royalty purchased by Schwimmer in Caudle's name.

(3) As to Caudle's action in deciding not to prosecute Sachs, the evidence showed that this determination was made in the normal course of Caudle's duties. The Bureau of Internal Revenue had recommended to the Justice Department that the case be prosecuted. It then became Caudle's duty[2] as Assistant Attorney General in charge of the Tax Division of the Justice Department, to determine whether Sachs' health was so precarious, as claimed, as to warrant foregoing the prosecution of a clear tax fraud. Sachs' case was but one of many whose prosecution depended upon medical factors.

Caudle was confronted with overwhelming medical prognoses that the grand mal epilepsy suffered by

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[1] Brief for the United States in opposition to petitions for certiorari to review the judgments of conviction, Nos. 738 and 739, Oct. Term, 1957, p. 40.

[2] This duty arose by virtue of the statutory provision, 26 U.S.C.A. § 7122, that "the Attorney General of his delegate may compromise any such [civil or criminal] case [arising under the internal revenue laws] after reference to the Department of Justice for prosecution or defense." A similar provision appeared in § 3761 of the 1939 Internal Revenue Code.

Sachs might prove fatal if the prosecution were forthcoming.[3] The two supervisory assistants whose duty was to sift the facts and make recommendations to Caudle both advised against prosecution, thereby overruling a contrary recommendation by a subordinate. Caudle claimed that his decision not to prosecute was motivated solely by those medical considerations as reflected in the reports of his assistants. But the Government charged that the determination was—by inference—a result of the influences brought to bear by Schwimmer.

(4) Schwimmer's contacts with Caudle were highlighted by the fact that in July, 1950, Schwimmer purchased through one Chris L. Rhodes an oil royalty in the name of Caudle and his wife. The Government asserted that Caudle was a participant in the negotiations for the royalty, accepted it gladly and was anxious to receive the first check. Such inferences rested on certain unsworn letters from Schwimmer to Rhodes which referred to "the other person interested" and to "receiving the go-ahead", though the person thus referred to remained unnamed in the letters.

Caudle testified, however, that when he first learned that the royalty had been purchased in his name he bitterly reprimanded Schwimmer on the telephone and

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[3] The prediction that Sachs might die if prosecuted was first made by three of his family physicians. That prediction was later supported by two disinterested physicians and by the evaluation of a group of Government doctors headed by the acting Superintendent of St. Elizabeth's Hospital in Washington, D. C. Only Dr. Robert M. Bell, a Government doctor, disagreed on the likelihood of a fatal outcome. All of the other doctors testified at the trial and reconfirmed their prognoses as of the time first given. But Dr. Bell was never called as a witness and was never cross-examined as to his opinion.

insisted that a retransfer be made immediately. Caudle kept insisting that the retransfer be made, but Schwimmer kept procrastinating on grounds of his health. A total of eight royalty checks were issued in Caudle's name before the property was finally retransferred to the Schwimmers in April, 1951. But the evidence was clear that Caudle never received a cent from any of those checks, that all the money went to Schwimmer and that Caudle's name was forged on four of the eight checks.

(5) The second cornerstone of the Government's assertions as to the relationship between Schwimmer and Connelly was Exhibit 100-J, consisting of an unsworn entry appearing in a book entitled "Journal" and kept in Schwimmer's handwriting:

Oct. ... 49	
Shu Stiles [Sachs' firm]	$10,000
Pd out Oil Royalty M.C.	4,200
held in Escrow to be paid out depending on whether I. Sachs case is dropped.	$ 5,800

Petitioners objected to the introduction of this exhibit, particularly since they were deprived by the mistrial of the right to cross-examine Schwimmer as to the exhibit's meaning. Five times the trial judge sustained these objections, emphasizing that the exhibit was ambiguous on its face and did not state to whom the $5,800 balance was to be paid if the case were dropped. The Government contended that it was to be paid to petitioners, Caudle and Connelly. Finally, on the Government's sixth attempt, the trial judge reluctantly admitted this "very poisonous piece of evi-

dence" with an indication that he would reconsider the matter in the event of a conviction. Tr. 1168-1173, 1223-6, 1241, 1368.

(6) At the close of the trial, the trial judge—Judge Hulen—withdrew from the jury's consideration the portions of the indictment regarding the offenses of bribery, perjury and knowingly making false statements and entries. Tr. 3130. After the jury returned a verdict of guilty on the remaining charge of conspiracy under 28 U.S.C. § 371, petitioners moved for judgments of acquittal or for a new trial. But Judge Hulen committed suicide before these motions could be heard. Judge Nordbye was appointed as a Successor Judge under Rule 25, F.R.Cr.P., Tr. 487, Vol. I, and, after a hearing, denied all motions. Sentence was then imposed and appeal proceedings followed. At no time has Judge Nordbye ever seen, heard or observed Schwimmer or any of the witnesses at the trial.

In the meantime, after the trial, Schwimmer suffered a very severe stroke, resulting in the loss of the powers of speech, reading and writing. He also suffered a partial paralysis of his right side. But he then began a period of slow recovery. By the summer of 1958 he once again could speak, though with difficulty. Eventually, in June, 1958, petitioners' attorneys were able to interrogate him under oath and procure sworn statements from him. A motion for a new trial on the basis of this newly discovered evidence was then filed. Schwimmer's sworn statements were then augmented by a deposition ad perpetuandum taken on written interrogatories pursuant to orders of Judge Nordbye. Both the sworn statements, App. 1-22, and the written interrogatories and answers, App. 22-73, are reprinted

in full in the joint appendix hereto. A comparative analysis of Schwimmer's testimony includes the following:

The assertions and facts developed at the trial	*Schwimmer's statements in reference thereto*
1. The Government asserted that Caudle knew of and approved of the royalty purchase. Caudle flatly denied such knowledge or approval.	1. Schwimmer did not tell or otherwise inform Caudle of the negotiation of the purchase. Caudle did not authorize such negotiation. App. 33.
2. The Government asserted that Caudle was greatly interested in the royalty payments and was "the other person interested" referred to in Schwimmer's correspondence with Rhodes. Caudle denied any such implication.	2. Schwimmer stated Caudle "was never interested in these oil royalties." App. 63. Caudle did not know of the dealings with Rhodes. App. 18. Schwimmer does not now know the identity of "the other person interested" referred to in the letter to Rhodes. App. 65.
3. Caudle testified that when he first learned of the royalty purchase he became angry with Schwimmer and insisted that it be taken out of his name.	3. Schwimmer testified that on Caudle's receipt of the information "he let me have it. He was angry with me." App. 18. Caudle "said I shouldn't have done it" and requested that all necessary steps be taken immediately to transfer it out of his name. App. 18-19, 33.
4. Caudle testified that he kept insisting that the oil royalty be retransferred.	4. Schwimmer stated that on various dates "he told me to get it out of his name and back into mine . . . he did not want to take it and keep it." App. 34.
5. Caudle testified that the delay in the retransfer was due to Schwimmer's procrastination on grounds of ill health.	5. Schwimmer stated that he delayed the retransfer "because of my illness, and because of various things or other" beyond his control. App. 19, 34.

The assertions and facts developed at the trial	*Schwimmer's statements in reference thereto*
6. A letter from Schwimmer to Rhodes in September, 1950, stated that Caudle "has already asked about" a royalty payment. Caudle denied making such an inquiry.	6. Schwimmer stated "Caudle had nothing to do with that royalty." He denied the truth of the statement in the letter to Rhodes. App. 67-68.
7. Caudle testified that he never received or kept any of the oil royalty payments.	7. Schwimmer stated Caudle never received any of these payments. App. 19-20, 35. Any money paid to Caudle on his endorsement was turned over "to me." App. 62. All the proceeds went to Schwimmer. App. 62.
8. Caudle testified that he did not endorse four of the eight royalty checks.	8. Schwimmer admitted that he or his secretary endorsed these checks by forging Caudle's signature. App. 62. Schwimmer received all the proceeds of the checks. App. 62. He further admitted he was not Caudle's agent in handling these checks. App. 69.
9. The Government asserted that Caudle was impliedly referred to in Exhibit 100-J and received some of the alleged pay-off money, Caudle steadfastly denied this.	9. Schwimmer testified that Exhibit 100-J was solely a record for his income tax purposes. App. 28-29, 54. Caudle never received any part of the $10,000 mentioned in this exhibit. App. 21, 35, 51. Nor did Caudle receive any part of the $5,800 held in escrow. Schwimmer himself received the $5,800. App. 29, 35. [Judge Nordbye found that "the entire $10,000 went to Connelly and Schwimmer." App. 83].

The assertions and facts developed at the trial	*Schwimmer's statements in reference thereto*
10. The Government asserted that a $3,600 item in Exhibit 100-P, a journal entry entitled "Reimbursement of Money Advanced Shu Stiles," related to the purchase of Caudle's oil royalty.	10. Schwimmer testified this item "had nothing to do with Caudle's oil royalty at all." App. 66.
11. The Government asserted that Schwimmer impliedly or expressly promised Caudle a reward as a consideration for a favorable determination as to the prosecution of Sachs for tax fraud.	11. Schwimmer flatly denied that there ever was such a promise. He stated Caudle never received anything whatsoever of value from Schwimmer or Sachs and there never was any kind of agreement or understanding relative to a favorable decision in the Sachs matter. App. 20, 35.

Schwimmer's statement and deposition were accompanied by affidavits and testimony of doctors, attorneys, a psychiatrist and a speech therapist attesting to Schwimmer's mental competence and memory at the time of his testimony. The Government, which had participated in the deposition by submitting 207 interrogatories, countered with a report from a neurologist and an affidavit of an internal revenue agent to the effect that Schwimmer did not have the physical or mental capacity to answer questions about events prior to his stroke.

Judge Nordbye, after hearing, denied petitioners' motions for a new trial. App. 91. In so doing he found that:

1. Schwimmer's testimony was newly discovered in the sense that, because of Schwimmer's bad health and the mistrial as to him, the petitioners had never before

had an opportunity to avail themselves of this testimony. App. 79.

2. Petitioners acted with due diligence in bringing this evidence to the Court's attention. App. 79.

3. The evidence was not only newly discovered "but is relevant" and "is not entirely cumulative, although in many respects it only tends to corroborate the evidence that defendants had offered heretofore in their behalf at the trial." App. 80.

4. Despite Schwimmer's physical condition and the "decided infirmities in his memory," it was the Court's considered view in light of the medical testimony that Schwimmer was competent to testify. App. 80-81.

5. ". . . in the event a new trial were granted, Schwimmer's deposition should be received and considered by a jury." Schwimmer "is a competent witness" and "the weight and credibility of his testimony is for the jury." App. 81.

6. "Whether, if sitting as a trier of the facts, I would probably acquit or convict the defendants in view of the additional proffered evidence by way of Schwimmer's deposition, is not determinative of the question." App. 89-90.

7. The decisive question, according to Judge Nordbye, was "whether or not it is probable that, if a new trial were granted, these defendants, with the addition of this newly discovered evidence to the present record, would be acquitted." App. 81. The Court answered that question in the negative. Without ever having seen Schwimmer or any witness at the trial, Judge Nordbye ruled that the proffered evidence was incredible. "It seems inconceivable," said the Court, "that

the additional evidence of the one who spawned the plan and scheme to corrupt government officials could have any weight in producing a verdict other than that which was returned by the jury." App. 91.

The Court of Appeals affirmed the denial of the motion, emphasizing anew the requirement that the newly discovered evidence, to justify a new trial, "must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal." 271 F. 2d 333 at 335; App. 96.

REASONS FOR GRANTING THE WRIT

The decision below necessarily presents an important question in the administration of criminal justice in the federal courts. That question is whether a new trial motion grounded on newly discovered evidence may properly be tested, under Rule 33 of the Federal Rules of Criminal Procedure, by the requirement that the new evidence be such as that, on a new trial, it would probably produce an acquittal.

Such a standard is in direct conflict with the principles expressed by this Court in *Griffin* v. *United States*, 336 U.S. 704. Indeed, the standard itself is inherently unworkable, creates an unfair burden of proof on the defendant and invades the function of the jury. Gross inconsistencies and uncertainties have marked the formulation and application of the standard in the lower federal courts. All these factors combine to make appropriate the exercise of this Court's certiorari jurisdiction to review this constantly recurring problem and to give authoritative guidance to the lower federal courts.

1. The direct conflict with the Griffin case

An oft-repeated statement in the lower federal courts, and one that has been reiterated and applied in this case, is that a new trial on grounds of newly discovered evidence may be had only if, among other things, the evidence is "such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal." *Johnson* v. *United States*, 32 F. 2d 127, 130 (C.A. 8).[4] This is the requirement that has been found wanting in this case and has resulted in the denial of the motion for a new trial.

This requirement as to a showing of the probability of acquittal has never been sanctioned or approved by this Court.[5] In *United States* v. *Johnson*, 327 U.S. 106, 111; note 5, with express reference to the aforementioned statement of criteria as expressed in the lower federal courts, the Court stated that in the context of that case it "need not consider what criteria should have guided the court in passing on the [new

[4] The other four criteria set forth in the *Johnson* case, and repeated below, are to the effect that (1) the evidence must be in fact newly discovered, (2) the movant must be diligent in uncovering the new facts, (3) the evidence must not be merely cumulative or impeaching, and (4) the evidence must be material to the issues involved. See App. 96.

[5] In *Williams* v. *United States*, 137 U.S. 113, 137, involving a claim for military pay in a Court of Claims suit, this Court said in passing that with respect to the papers constituting newly discovered evidence in the matter "the Court of Claims says that it is 'of the opinion that if they had been put in evidence on the trial they would not have changed the result.' We concur in this view, after having examined the papers." This statement, sometimes cited as authority for the requirement in question, was not made in the context of a criminal proceeding; nor was it anything more than an *ad hoc* approval of a lower court finding without reference to any general standard for new trial motions.

trial] motion." A similar reservation as to these criteria is found in *Mesarosh* v. *United States*, 352 U.S. 1, 9.

But the decision in *Griffin* v. *United States*, 336 U.S. 704, 708-709, without specific reference to the standards established by the lower courts, created a criterion for testing a new trial motion which is totally inconsistent with any requirement that the newly discovered evidence "probably produce an acquittal." This *Griffin* criterion is expressed in the words of the Court remanding the case to the Court of Appeals for the District of Columbia to consider (336 U.S. at 709):

> ". . . whether it would not be too dogmatic, on the basis of mere speculation, for any court to conclude that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before it."[6]

The criterion as thus formulated was created by this Court in direct response to the issue in that case as to what standard should guide a court in evaluating the newly discovered evidence as a basis for a new trial. In that respect the brief of the United States had expressly called the Court's attention to the prevailing lower court rule that the evidence must be such as would probably produce an acquittal or a different verdict.[7] But that brief, signed by the Solicitor Gen-

[6] On the ensuing remand, the Court of Appeals said: "We think it would be too dogmatic. . . The appellant is therefore entitled to a new trial." *Griffin* v. *United States*, 183 F. 2d 990, 992 (App. D.C.). A new trial never occurred; however, since the defendant pleaded guilty to the offense of second degree murder and was sentenced to a prison term of 5 to 21 years. Crim. No. 246-47 (D.C.D.C.).

[7] Brief for the United States, *Griffin* v. *United States*, 336 U.S. 704, No. 417, Oct. Term, 1948, p. 20.

eral, did more than refer to the rule; it urged a substantial modification thereof in the following terminology:[8]

> "However, where the offense in question is of a serious type, and particularly in a capital case, we believe that the rule as stated may place too heavy a burden on the defendant who moves for a new trial on the ground of newly discovered evidence, and that the proper rule should be that the newly discovered evidence relied on must be such that there is a *reasonable possibility* that its consideration by a jury at a new trial would result in the return of a different verdict." [Emphasis in original.]

Significance must therefore be attached to the fact that the Court in *Griffin* neither adopted the lower court rule as to the probability of acquittal nor accepted the Solicitor General's modification thereof in terms of reasonable possibilities. Instead the emphasis was placed on the reasonableness of the conclusion as to whether the jury would "have attached significance to the evidence favorable to the defendant." And that formula was enunciated without limitation as to the nature or the seriousness of the crime involved.

The *Griffin* formula must therefore be regarded as a flat rejection of the rule on the probability of acquittal. The latter rule, as the Solicitor General conceded in the *Griffin* case, places "too heavy a burden on the defendant."[9] It forces him to demonstrate that he is

[8] *Ibid.*, pp. 20-21.

[9] As Judge Jerome Frank said in relation to a requirement that there be affirmative "evidence of defendant's innocence": "Not only is such a doctrine most unjust and (I think) unreasonable, but it comes perilously close to putting on the defendant the burden of proving his innocence: Having once been convicted,

probably innocent and to prove, without the benefits of a jury trial, that a jury would probably acquit him. In effect the lower court rule limits new trials to those innocent persons who can prove that they have been unjustly convicted. But Rule 33 of the Federal Rules of Criminal Procedure permits new trials whenever "required in the interest of justice." Obviously the interests of justice may require or justify a new trial even where probable acquittal has not been established.

The *Griffin* case, moreover, involved new evidence in the nature of an uncommunicated threat to the defendant, merely tending to lend credence to his claim of self defense. In the instant case, however, the new evidence "cuts to the very heart of the testimony" adduced at the trial, cf. *United States* v. *Shotwell Mfg. Co.*, 355 U.S. 233, 242, and directly affects the implications of guilt upon which the jury verdict rested.[10] There would seem to be more reason to expect a jury to attach significance to such directly pertinent evidence than to the indirect evidence of the *Griffin* variety. Hence the *Griffin* criterion is all the more pertinent here.

This clear conflict between the lower federal court rule and the *Griffin* rule is a matter of obvious importance and makes appropriate the exercise of the Court's

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unfairly as it now appears from the new evidence, he can procure a fair re-trial only by offering affirmative evidence to prove his innocence—although a basic principle of democratic justice requires the government to prove guilt in order to obtain a valid conviction." *United States* v. *On Lee*, 201 F. 2d 722, 726 (dissenting opinion).

[10] To use the words of Mr. Justice Douglas, sitting as Circuit Justice in *Wolcher* v. *United States*, 76 S. Ct. 254, 255, 100 L. Ed. 1521, 1523, the new evidence here "might well tip the scales in defendant's favor, as it goes to the heart of the case."

certiorari jurisdiction in this case. The question plainly affects not only the evaluation of the newly discovered evidence in the instant case but the standard to be applied to all motions for a new trial under Rule 33 grounded on newly discovered evidence.

2. The conflicts involved in the "probable acquittal" rule.

The "probable acquittal" rule of the lower federal courts not only conflicts with the *Griffin* criterion but the rule itself abounds with conflicting formulations and meanings. The rule has become chameleonic and inconstant, devoid of any definitive content. Such a rule, if it is to stand as a meaningful guide for testing new trial motions, needs and deserves a most thorough and authoritative examination. Only this Court can determine if the rule is valid. And, if the rule be proper, only this Court can give it the meaning necessary to insure a uniform application in all federal courts.

At least four different versions of the rule in question are extant:

(a) *The "probable acquittal" version.* The most frequent verbalization of the rule in the federal courts is that the newly discovered evidence must be such as "would probably produce an acquittal." Such was the formulation in the court below.[11] This version of the rule is generally credited to the opinion in *Johnson* v. *United States*, 32 F. 2d 127, 130 (C.A. 8), which cites as authority "12 Cyc. 734, and cases cited." That

[11] See also *Johnson* v. *United States*, 32 F. 2d 127, 130 (C.A. 8); *Evans* v. *United States*, 122 F. 2d 461, 469 (C.A. 10); *Wolcher* v. *United States*, 233 F. 2d 748, 751 (C.A. 9); *United States* v. *On Lee*, 201 F. 2d 722, 724 (C.A. 2); *United States* v. *Rutkin*, 208 F. 2d 647, 649 (C.A. 3).

authority, however, consists of a rather general and confused synthesis of state court decisions, some of which support the "probable acquittal" language and others of which merely say that the new evidence need only justify a jury in returning a verdict other than that returned.[12] The latter line of cases would seem to indicate a standard of proof much less stringent than proving one's probable innocence.

(b) *The "different verdict" version.* Still another source of the rule is said to be the early Georgia decision in *Berry* v. *State*, 10 Ga. 511, 527, mentioned by this Court in *United States* v. *Johnson*, 327 U.S. 106, 111, note 4. The *Berry* case, however, casts the rule in terms of the new evidence being "so material that it would probably produce a different verdict, if a new trial were granted."

The *Berry* case in turn relied upon very early state court opinions. One of them, *Robins* v. *Fowler*, 2 Ark. 133, 144, does not even mention a requirement of probably producing a different verdict but refers primarily to the need for materiality. Others speak not in terms of producing an "acquittal" but of producing "a different verdict" which would "be almost, if not quite, equivalent to a verdict of acquittal."[13]

Perhaps the formulation of the rule in the *Berry* case has led some federal courts to drop the reference

[12] See *State* v. *Hendrix*, 45 La. Ann. 500, 501; *Rainey* v. *State*, 53 Ind. 278, 279; *Sahlinger* v. *People*, 102 Ill. 241, 248; *State* v. *Diskin*, 35 La. Ann. 46, 48; *Baker* v. *State*, 111 Ga. 141, 143.

[13] See *Commonwealth* v. *Flanagan*, 7 Watts & Serg. 415, 423; *Moore* v. *Philadelphia Bank*, 5 Serg. & Rawles 41, 42; *Commonwealth* v. *Williams*, 2 Ashmead 69, 76; *Lessee of Ludlow's Heirs* v. *Park*, 4 Hamm. (Ohio Rep.) 5, 44-45.

to "acquittal" and refer only to the probability of a "different verdict" resulting on the new trial.[14] That distinction can have significant meaning in terms of the movant's burden of proof since a different verdict, other than that of acquittal, can result where the offense involved has different degrees of culpability, or where at least one juror is impressed by the new evidence and the verdict is that of a hung jury.

(c) *The "'materiality" version.* The *Berry* case further suggests that the requirement of probability of a different verdict may well be only an elaboration of the concept of materiality of the new evidence. The *Berry* criterion states that the evidence must be "*so material* that it would probably produce a different verdict." If, then, the defendant can prove that the evidence is highly significant and material to the case, thereby justifying a verdict of not guilty, has he not demonstrated for purposes of this rule that a different verdict probably would result?[15]

If materiality is the key to the probability of a different result, have not the lower federal courts, including the court below, improperly separated the concept of materiality or relevancy from the probability of an acquittal or a different verdict? And has

[14] See, e.g., *Heald* v. *United States*, 175 F. 2d 878, 883 (C.A. 10); *Nilva* v. *United States*, 212 F. 2d 115, 124 (C.A. 8); *Apel* v. *United States*, 247 F. 2d 277, 285 (C.A. 8). In its brief to this Court in *Griffin* v. *United States*, 336 U.S. 704, No. 417, Oct. Term, 1948, p. 20, the United States summarized the rule in terms of evidence which "would probably result in a different verdict." No mention was made of the necessity of a probable acquittal.

[15] See *Commonwealth* v. *Williams*, 2 Ashmead 69, 81 ("so material, as that it would probably produce a different result"); *Rainey* v. *State*, 53 Ind. 278, 279 ("not so material that it would, with any certainty, produce or justify any different result").

not the petitioner herein, having demonstrated to the satisfaction of the District Court that the new evidence "is relevant . . . not entirely cumulative . . . should be received and considered by a jury" (App. 80-81), sustained his burden of proof?

(d) *The "might reach a different conclusion" version.* Still another version of the rule is to be found in the so-called recantation cases, where a Government witness recants after trial. Here the federal courts generally abandon the "probable acquittal" formulation and insist that the defendant merely show that without the recanted or false testimony the jury "might" have reached a different conclusion.[16] But at least one federal court, in stating the test to be whether the new evidence "would in reasonable likelihood have given rise at the trial to a different result," has applied essentially this version in a non-recantation case. *Apel* v. *United States*, 247 F. 2d 277, 285 (C.A. 8). And this is basically the version which the United States urged upon this Court in *Griffin* v. *United States*, 336 U.S. 704,[17] suggesting that the new evidence need only be such that there is a "reasonable pos-

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[16] *Larrison* v. *United States*, 24 F. 2d 82, 88 (C.A. 7); *United States* v. *Marachowsky*, 213 F. 2d 235, 238 (C.A. 7); *Gordon* v. *United States*, 178 F. 2d 896, 900 (C.A. 6); *Winer* v. *United States*, 228 F. 2d 944, 952 (C.A. 6). This line of cases, applying a different standard in terms of the possibility of a different result, has been noted by this Court without comment in *United States* v. *Johnson*, 327 U.S. 106, 111, note 5, and *Mesarosh* v. *United States*, 352 U.S. 1, 12, note 6. This different rule in recantation cases, however, has been termed "questionable since it was without authority." Note, 39 Minn. L. Rev. 316, 317 (1955). See, in general, Orfield, New Trial in Federal Criminal Cases, 2 Vill. L. Rev. 293, 324-327 (1957).

[17] Brief for the United States, No. 417, Oct. Term, 1948, p. 21.

sibility" of a different verdict. The *Griffin* case, of course, did not involve recantation.

By what standard should petitioner's new evidence—or that of any person seeking a new trial—be judged? By the probability of acquittal? By the probability of a different verdict? By the materiality of the evidence? By the reasonable possibility of a different verdict? By the possibility that the jury "might" reach a different conclusion? Or, in the words of the *Griffin* ruling, by the possibility that the jury would attach "significance to the evidence favorable to the defendant"?

An affirmative answer to any one of the foregoing standards can be found in terms of precedent. Only this Court can determine which of the standards is the proper one. Only this Court can remove the inconsistencies and conflicting formulations that have encrusted themselves on the standard which the court below sought to apply. And if the findings of the District Courts on new trial motions are to have the non-reviewable status accorded them by this Court in *United States* v. *Johnson*, 327 U.S. 106, 111, and in *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 247, a uniform and meaningful standard in this context must be established to give defendants fair notice as to their burden of proof and to guide the courts in resolving such motions.

3. The District Court's abuse of discretion.

Even assuming that it was proper to evaluate petitioner's newly discovered evidence by the probability of acquittal, the District Court's application of that standard to the facts of this case reveals a gross abuse of discretion justifying further review by this Court.

That abuse consists of a credibility evaluation exceeding the power of the court and invading the exclusive function of a jury.

(a) *The abusive condemnation of the new evidence.* The District Court, which was affirmed *in toto* by the Court of Appeals, held that the new evidence is indeed newly discovered, that the petitioners used due diligence in bringing it before the court, that the evidence is relevant and material to the issues, that the witness is competent and that the evidence would be admissible in a new trial if such were granted. App. 80-81. Moreover, on two occasions the District Court opinion observes that "the weight and credibility of his [Schwimmer's] testimony is for the jury" (App. 81) and that "To predict what a jury would do in appraising Schwimmer's testimony is of course something the Court cannot determine with any mathematical certainty" (App. 89).

That Schwimmer's testimony was relevant and material is beyond doubt. The conviction necessarily rested on the unsworn letters, entries and statements of Schwimmer, from which the critical inferences were drawn. But through a fortuitous circumstance beyond anyone's control—the illness of Schwimmer—Schwimmer's testimony never got to the jury so as to explain the written documents and to negate the resulting inferences. Thus the most crucial evidence in petitioner's behalf was absent at the trial.

And because it was so evident at the time that only Schwimmer could testify as to these crucial factors, a timely motion for a continuance or a mistrial was made by petitioner. The denial of that motion was affirmed, however, on the speculative assumptions that had Schwimmer been able to testify he might have

claimed the Fifth Amendment or his testimony might have had no tendency to exonerate petitioner. See *Connelly* v. *United States*, 249 F. 2d 576, 582-583 (C.A. 8). **Those assumptions have now been proved false.** Schwimmer is able to testify and he has been found competent as a witness. He has claimed no privilege and his testimony, which has been found admissible, has a strong tendency to exonerate both petitioners. His testimony explains what was left unexplained at the trial. It directly refutes the criminal inferences which had been critical to the conviction. His testimony, in brief, supplies certain vital elements of fact which might well have produced a verdict of acquittal for the petitioner.[18]

Yet petitioner has been denied a new trial because of the District Court's unprecedented and abusive condemnation of Schwimmer's credibility as a witness. He has been condemned as "an admitted perjurer", a person still under indictment, a "fixer", the "arch conspirator" and a "discredited witness". App. 81, 90. His motives "were venal and corrupt." App. 90. Hence, the District Court concluded, it was "simply incredible" and "seems inconceivable" that Schwimmer's testimony—in every other respect material and relevant and competent—could possibly have "the weight and effect of producing an acquittal." App. 90-91.

[18] See *Amos* v. *United States*, 218 F. 2d 44 (App. D.C.), where the court ruled: "We think a new trial should have been granted. We have held that newly discovered evidence which is merely cumulative does not require a new trial. *Thompson* v. *United States*, 88 U.S. App. D.C. 235, 188 F. 2d 652. But that principle should not be applied where, as here, a disinterested witness becomes available who can supply evidence of vital importance and the only similar evidence at the trial was that of the defendant himself."

The District Court's opinion on its face is contradictory; it violates its own wise precept that the weight and credibility of Schwimmer's testimony are for the jury. App. 81. More importantly, to the extent that credibility may properly be considered by the court in ruling on a new trial motion, such an evaluation of Schwimmer as a witness, such a bitter analysis of his motives and his character, far exceeds legitimate bounds. This judicial analysis is flatly contrary to the established principle that a defendant charged with criminal activity and perjury—which is the most that can be said from the record as to Schwimmer—"is no more to be visited with condemnation than he is to be clothed with sanctity, simply because he is under accusation, and there is no presumption of law in favor of or against his truthfulness." *Allison* v. *United States*, 160 U.S. 203, 210. See also *Hicks* v. *United States*, 150 U.S. 442, 452; *Quercia* v. *United States*, 289 U.S. 466, 470.[19] A man under indictment may testify falsely or truthfully; or he may testify truthfully only as to certain facts. But he is not to be wholly and unmitigatingly condemned, particularly when the liberty of others is at stake. As this Court said in *Reagan* v. *United States*, 157 U.S. 301, 305: "It is within the province of the court to call the attention of the jury to any matters which legitimately affect his testimony and his credibility. This does not imply that the court may arbitrarily single out his testimony and denounce it as false."

[19] "Much evidence in the way of affidavits was introduced by both sides touching the character of the affiants . . . and we might say that it was about equal in volume and weight, but whether their testimony is or not credible will be a question for the jury upon another trial, and not one for us to determine at this time." *Johnson* v. *Commonwealth*, 188 Ky. 391, 399.

One cannot definitely say, from a mere examination of the cold record as indulged in by the courts below, what portions of Schwimmer's testimony might be believed or disbelieved by a jury in light of the attacks which would undoubtedly be made on his character and credibility by the prosecution. A jury conceivably could believe all that he said in exoneration of Caudle and Connelly while finding him otherwise a perjurer or unworthy of belief. It could give great weight to the fact that his new testimony for the most part is against his own interest and that the consistency with petitioners' testimony gives the ring of truth to Schwimmer's story in that respect. And all that might happen even though Schwimmer be thought to be a "fixer", "the arch conspirator", "an admitted perjurer" and a "discredited witness". App. 90, 97. But the important point is, in Judge Learned Hand's words, that the judge's function is not to establish "any quantitative standards of verity;" our jurisprudence, while recognizing the right of the prosecution and the defense to attack the credibility of any witness, has "unconditionally left it to the jury to determine how persuasive the testimony of any witness shall be." *United States* v. *Reina*, 242 F. 2d 302, 307 (C.A. 2).[7]

What the District Court here did was to engage in a particularly abusive type of dogmatic speculation as to the effect of the new evidence, a dogmatic speculation which this Court condemned in *Griffin* v. *United States*, 336 U.S. 704, 709. The court made up its own mind as to the credibility of Schwimmer and then

[7] As Mr. Justice Story said for the Court in *United States* v. *Marchant*, 12 Pet. 41 U.S. 480, 483, "although a competent witness, the credibility of his testimony is a matter for the consideration of the jury, under all the weight of circumstances connected with the case, and his interest in the result."

arbitrarily and dogmatically assumed that any jury would necessarily adopt the same viewpoint and disregard completely any portions of his testimony favorable to petitioners. The court tried to judge not the weight and probable effect of the new evidence if believed by the jury but rather the likelihood of a jury believing the testimony of one whom the judge found to be a thorough scoundrel and liar. The entire emphasis was placed on the witness himself, not the new evidence which he could give and which was admittedly relevant, material and admissible. In thus relegating unto itself an inherent function of the jury, the District Court disregarded this Court's admonition that "it cannot be determined conclusively by any court that . . . [the] testimony was insignificant in the general case against the defendants" and that "Only the jury can determine what it would do on a different body of evidence." *Mesarosh* v. *United States*, 352 U.S. 1, 12.

These considerations all add up to a plain abuse of discretion justifying review under the principles set forth in *United States* v. *Johnson*, 327 U.S. 106, 111. And in the exercise of this Court's supervisory jurisdiction over the administration of criminal justice in the federal courts, the determination below should be reversed and a new trial granted on the basis of newly discovered evidence already found to be relevant, material and admissible.

(b) *The weight to be accorded the views of the successor judge.* Judge Nordbye, as a successor judge, did not preside at the trial of the petitioners. That trial covered thirty-eight days and involved sixty-six witnesses; more than one thousand pages of exhibits were introduced. Judge Nordbye saw and observed none of those witnesses; he saw none of the reactions of the

jury; he felt none of the impact of the exhibits as they were introduced; and the entire atmosphere of the courtroom as the trial progressed was lost upon him. More particularly, he has never seen either of the petitioners or Schwimmer. To him, Schwimmer—whom he so thoroughly analyzed and roundly condemned—is nothing more than a name.

Thus Judge Nordbye's views and opinions as to the newly discovered evidence are completely stripped of the weight and value they might otherwise have had he presided at the trial and observed the witnesses. The findings made as to Schwimmer's credibility and as to the probable effect of his testimony do not come from a judge who has watched the case unfold from day to day and thus is "exceptionally qualified" to pass judgment on that new evidence. See *United States* v. *Johnson*, 327 U.S. 106, 112. Lacking the "feel of the case" which this Court deemed so important in *Conn* v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212, 216, Judge Nordbye was no "better able to estimate the value," *Moore* v. *United States*, 150 U.S. 57, 60, of the old and the new testimony than any appellate judge viewing the cold printed record. See also *Wolcher* v. *United States*, 233 F. 2d 748, 751 (C.A. 9). He had no perspective, no superior position, no vantage point and no experience with the case which might lend special cogency to his views.

This fact serves to underscore the abuse involved in the extreme and total condemnation of Schwimmer's credibility and in the resulting arbitrary conclusion that an acquittal of petitioner was not probable. Drained of the special competence which only a presiding judge can impart, Judge Nordbye's findings and conclusions, for the reasons heretofore expressed, are plainly reviewable and reversible.

CONCLUSION

This case presents an egregious example of the type of abuse that arises when a District Court tries to apply a broad and uncertain doctrine as to the probability of acquittal in passing on a new trial motion. The need for correcting the grave abuse of discretion and the miscarriage of justice in this case is a compelling one. But above all, the need for defining the proper standard as to the effect of the newly discovered evidence is an urgent one from the standpoint of a fair and uniform administration of criminal justice in the federal courts. Once that standard is definitively formulated in light of the controlling decision of this Court in *Griffin* v. *United States*, 336 U.S. 704, 709, the new evidence in this case can be tested pursuant thereto and justice accorded to this petitioner. And all others who seek new trials in federal courts will know by what standard their newly discovered evidence will be judged in relation to the possible or probable impact on a new trial.

To those ends, therefore, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 12, 1960

FILE COPY

Office-Supreme Court, U.S.
FILED
MAR 10 1960
JAMES R. BROWNING, Clerk

Nos. 704 and 705

In the Supreme Court of the United States

OCTOBER TERM, 1959

T. LAMAR CAUDLE, PETITIONER

v.

UNITED STATES OF AMERICA

MATTHEW J. CONNELLY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals, affirming the denial by the district court of petitioners' motions for a new trial, is reported at 271 F. 2d 333 (App. 92–98).[1] The opinion of the district court (App. 76–91) is not reported. The opinion of the court of appeals affirm-

[1] "App." refers to the appendix filed by the petitioners herein; "R." to the record of the proceedings in the court of appeals on this motion; "G.J. Tr." to the grand jury transcript.

ing petitioners' conviction is reported at 249 F. 2d 576, certiorari denied, 356 U.S. 921, rehearing denied, 356 U.S. 964.

JURISDICTION

The opinion of the court of appeals was rendered on November 9, 1959. Petitioners' motions for rehearing were denied on December 14, 1959 (App. 100–101). On December 29, 1959, Mr. Justice Black extended the time for filing a petition for writ of certiorari to and including February 12, 1960 (App. 101). The petitions for writs of certiorari were filed on February 12, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the ruling of the district court that newly discovered evidence was insufficient to warrant a new trial for petitioners should be overturned.

RULE INVOLVED

Rule 33, F.R. Crim. P., provides in pertinent part:

> The court may grant a new trial to a defendant if required in the interest of justice. * * * A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on removal of the case. * * *

STATEMENT

1. Petitioners were convicted June 14, 1956, in the District Court for the Eastern District of Missouri on a charge of conspiracy to defraud the United States

of the proper administration of the internal revenue laws and regulations and of the proper and faithful services of petitioners. Each of them was sentenced to imprisonment for a period of two years and a fine of $2,500. The court of appeals affirmed. *Connelly v. United States*, 249 F.2d 576 (C.A. 8). This Court denied certiorari, 356 U.S. 921.

The trial commenced on May 7, 1956. On May 23, a co-defendant, Harry I. Schwimmer, a lawyer of Kansas City, Missouri, was stricken with a heart attack and a mistrial was thereafter declared as to him. The contemporaneous motions for mistrial of petitioners were denied. After the verdict, these motions were renewed and motions for judgment notwithstanding the verdict or, in the alternative, for a new trial were filed. Before these motions were heard, Judge Hulen, the trial judge, died, and Judge Gunnar H. Nordbye was named as successor judge, pursuant to Rule 25, F.R. Crim. P. Petitioners filed a supplemental motion for new trial, based on Judge Hulen's death and upon newly discovered evidence as to the alleged failure of some of the jurors to answer material questions upon *voir dire* examination. On March 4, 1957, petitioners filed an additional motion for a new trial, based on newly discovered evidence. All defense motions were overruled, following which sentence was pronounced.

2. After affirmance of the convictions and denial of review by this Court, petitioner Connelly, on June 12, 1958, and petitioner Caudle, on June 18, 1958, filed the present motions for new trial based on newly discovered evidence (the third motion based on newly

discovered evidence and the fourth new trial motion). Substantially identical allegations were made, to the effect that Schwimmer, after his heart attack during the trial, had suffered a cerebro-vascular accident, or stroke, on October 17, 1956; as a result, he had been deprived of the power of speech; but he had recently made a partial recovery (R. 6–9, 50–53). Both motions alleged that, if Schwimmer's testimony had been available at the trial, petitioners "should have won an acquittal and been exonerated by the Court and jury instead of convicted" (R. 7, 51). Attached to the motions were sworn statements by Schwimmer, recently obtained (App. 2–22). Petitioners sought his deposition by interrogatories and counter-interrogatories (R. 64–71).

Submitted with the motions was a statement of Dr. Irving S. Wright, Schwimmer's personal physician since September 27, 1954. Schwimmer reported a history of coronary thrombosis in March 1949, followed by a very serious similar attack in April of that year.[2] He had suffered a series of light strokes after the trial in May 1956, followed by a severe stroke on October 17, 1956, which caused a loss of speech and partial blindness. He had not improved appreciably until about three months before the date of the doctor's statement which was June 5, 1958. The doctor ex-

[2] In his testimony to the grand jury, which was submitted to the trial court, Schwimmer testified that his wife had been told by Dr. Karl Menninger "just as the other doctors explained to me later on when I noticed it myself, that this damage to my brain was a result of my heart attack, had probably caused me loss of memory up to a certain point" (G.J. Tr. 2323–2325).

pressed the opinion that emotional or physical stress would endanger the patient's life (R. 10–12).

At the request of the government, Schwimmer was examined on July 5, 1958, by Dr. John E. Scarff, a neuro-surgeon of New York City, who reported in part (R. 99):

> When I asked the patient about his memory, he told me that it was "very bad." I specifically asked him what he could remember about his life before his last cerebrovascular accident ("stroke"). He told me in his slow, hesitant and aphasic type of speech that he could remember "living in this house" and could remember his wife, and could remember that the colored maid had been with him before he had his stroke; but he added, "that is about all I can remember before my stroke." During this part of the examination the patient became quite emotional and cried on several occasions.

Dr. Scarff's conclusion was (R. 100–101):

> In regard to the patient's mental competence to testify on legal matters pertaining to events which took place prior to his cerebro-vascular accident of October 17, 1956, I am of the firm opinion that he is incompetent. The patient stated to me in very positive language that he could remember almost nothing about his life prior to his stroke.

The court granted the motion to take Schwimmer's deposition by interrogatories and cross-interrogatories. The deposition was taken on September 29 and 30, 1958, in the presence of attorneys for all the parties, Schwimmer's physician, and his daughter.

3. A matter principally stressed was Schwimmer's explanation of a government exhibit, 100–J, which had been admitted at the trial. This exhibit reads as follows:

OCT—49

Loan $2,500	
From I. Sachs	
Shu-Stiles	$10,000
Pd out Oil Royalty M. C	4,200
	$5,800

Held in Escrow to be paid out depending on whether I. Sachs case is dropped.

In the grand jury investigation, Schwimmer had testified that he had entered these items in his journal as fees (G.J. Tr. 2505–2515, 2549–2552, 2596–2597). To his best recollection the $2,500 was for work already done and the $10,000 was for services to be rendered (G.J. Tr. 2514–2515). Only a small amount was apportioned for the year 1949 for tax purposes and the rest was reported in subsequent years when the work was done, although his returns were prepared on a cash basis (G.J. Tr. 2549–2552). The $10,000 was a retainer and not a deposit by Sachs (G.J. Tr. 2513–2514). Schwimmer also testified that he never had an arrangement with Sachs for the return of any part of the $10,000 if his case was prosecuted, nor did he have any memory that he had ever agreed with anyone that any part of the $10,000 was to be held in escrow for any purpose, nor did he have any independent recollection that his fees were

to be contingent upon the outcome of the case (G.J. Tr. 2615–2617).[3]

The place of Exhibit 100–J in the context of the trial is set forth in the opinion affirming petitioners' conviction (249 F. 2d 576). The Irving Sachs tax evasion case had been referred to the Department of Justice on August 12, 1949, after it had been pending in the Bureau of Internal Revenue for about four years, where delays had been procured by Schwimmer with the assistance of petitioner Connelly. The court says, at page 586:

> In September of 1949 Connelly then called Caudle and requested further postponement for his "friend" Harry I. Schwimmer. In response to this request Caudle relayed a message through Connelly to Schwimmer that Schwimmer could come in whenever he wanted but as soon as possible and that a postponement would be all right because the statute of limitations was not involved. A few days subsequent to this contact between Connelly and Caudle, Sachs paid $2,500 from Shu-Stiles, Inc. money to Schwimmer and on October 12, 1949, gave Schwimmer a check for $10,000, from which Schwimmer purchased an oil royalty for Connelly. * * *

The court of appeals quotes and adopts the finding of Judge Nordbye on the admissibility of the journal entry made by Schwimmer (249 F. 2d at p. 587):

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[3] The foregoing testimony was the basis for the indictment for perjury returned against Schwimmer on November 18, 1955, which is referred to in the opinions of the district court and the court of appeals.

Government's Exhibit 100–J does not represent the entry of a mere narrative event, but it consists of an act of a conspirator who was handling the fund by and through which the conspiracy was to be accomplished. The entry consists of a recording of the receipt of the first anticipated disbursement thereof and the earmarking of the remaining funds for the purpose of carrying out the conspiracy. To earmark or allocate the remainder of a slush fund which has been created for the purpose of consummating an unlawful conspiracy would be an act in furtherance of such conspiracy.

We are in accord with Judge Nordbye's views. There was independent evidence that on October 12, 1949, co-conspirator Sachs, president of Shu-Stiles, Inc., gave Schwimmer a $10,000 check in addition to a prior payment of $2,500 on September 22, 1949, both of which are reflected in this exhibit. This testimony shows that these entries were made during the existence of the conspiracy. We think the exhibit was properly admitted as against both appellants.

4. Schwimmer's answers to the defense interrogatories on this motion for a new trial may be summarized as follows: The exhibit [No. 100–J] is in his handwriting. He kept the record for the purpose of income tax procedure. He had not purchased any oil royalty in October 1949 for $4,200. That entry was made afterward, but he could not say when. The item of $5,800 to be held in escrow was to be paid to him if the Sachs case was dropped; however, the amount came to $6,400. He did not know whether he reported any part of this on his federal income tax return

(App. 28–30). He purchased an oil royalty for petitioner Connelly, paying for it $3,600, but selling it to the latter for $700 without disclosing to him its actual cost. Later, Schwimmer's daughter bought it from petitioner Connelly for $1,800 (App. 30–31). Schwimmer also bought an oil royalty for petitioner Caudle. Caudle became angry with him and told him he should not have done it and to get it out of his name. Caudle did not receive any of the dividend checks from the royalty; nor did he receive any part of the $10,000 or the $5,800 shown in Exhibit 100–J (App. 32–35).

On the government's cross-interrogatories, Schwimmer stated that the Sachs case was the first tax case he had ever handled (App. 38). He agreed with his co-counsel in the case that he would bill the client when the work was finally concluded (App. 39). He received a retainer of $1,350 from the client on January 2, 1948 (App. 40). He presumed that he told the grand jury that, of the $10,000 check he received from Shu-Stiles, $5,800 was going to him and $4,200 was going to Matt Connelly, but he did not know whether he told them that in the first place (App. 50). He told the grand jury that the $10,000 check was a retainer. He told them a certain amount was going to him and a certain amount to Matt Connelly, but the latter never knew about it (App. 51). His co-counsel were not supposed to know about this (App. 52). He did not know whether he explained to the grand jury that part of the $10,000 was intended or actually used to buy an oil royalty for Connelly (App. 53).

When shown Exhibit 100–J, Schwimmer stated, "I cannot read the exhibit at all." But he remembered making the entry, "because I got the figures down here" (App. 54). He was asked (App. 55):

> 98th Interrogatory: In respect to the line "Pd out Oil Royalty M. C. 4,200", it has been conceded that "M. C." refers to Matthew Connelly, and that $3,600 for an oil royalty was taken from this account. Why did you indicate the sum of $4,200 here as the sum used for oil royalty?
>
> Answer: I don't know why I did that.

Schwimmer stated that the "escrow" referred to in the $5,800 item "to be paid out depending on whether I. Sachs is dropped" meant that the money was to go to him. He did not know why it would be "paid out" if it was already in his account (App. 56). It was his idea that the royalty checks payable to Connelly be sent to his own office in Kansas City and then forwarded to Connelly. The purpose was not to make it difficult to trace the transactions (App. 61).

Schwimmer presumed that he and possibly his secretary had indorsed petitioner Caudle's name to some of his checks. He admitted that the first three of Caudle's oil royalty checks were indorsed first by Caudle and then by him, following which he bought a cashier's check in the total amount of all three, that he kept the cashier's check a year; and then negotiated it in Puerto Rico. He had a reason to do this, but he did not know what it was (App. 62–63).

He was asked whether he wrote a letter on July 13, 1950, to Chris Rhodes, stating that he [Schwimmer] was willing to pay $3,300 for an oil royalty but he

had to get this information to the person interested, which should take a couple of days; however, he was pretty confident that the latter would take it. He answered that he did not admit writing the letter, but he "was pretty close to that." He did not know who the other person referred to was. He did not remember whether he wrote Rhodes two days later, saying that he had just received word to go ahead on the purchase and that it should be in the name of T. L. Caudle, 2939 Newark, N.W., Washington, D.C. (App. 65–66).

Interrogated as to a check from Shu-Stiles to himself in the amount of $3,600, dated July 15, 1950, Schwimmer stated he presumed that he deposited it in the bank. The entry in his journal, Plaintiff's Exhibit 100–P, of $3,600 as "Reimbursement of Money Advanced Shu-Stiles" had nothing at all to do with Caudle's oil royalty. Schwimmer did not know what it meant (App. 65–67).

Schwimmer was further asked as to a letter admitted in evidence, dated September 18, 1950, from himself to Chris Rhodes, asking the latter to check with the Sinclair Oil Company relative to the September 15 royalty check, and stating, "Mr. Caudle has already asked me about it." Schwimmer said he did something like that, but Caudle had nothing to do with it (App. 67). He was then asked (App. 67–68):

> 180th Interrogatory: If you wrote the letter, did you tell Rhodes the truth when you said that Caudle had already asked about the September 15th oil royalty check?
>
> Answer: No, it—

> Well, what shall I answer, yes or no? I said Caudle had nothing to do with that royalty.

Schwimmer did not remember, but supposed that he wrote a letter on October 12, 1950, telling Rhodes he still had not received the September 15th check, and stating, "I hate like the devil to bother you, but I am sort of in a spot" (App. 68).

He stated that he never told Mr. Sheffrey, co-counsel in the Sachs case, that he wanted to give some oil royalties to Caudle because of his attitude in the case; Sheffrey lied about that (App. 69). He further said that, in arranging for the papers and royalty checks in both the Caudle and Connelly oil transactions to come to his own office, he did not intend to conceal the transactions, but he did not know why he did it that way (App. 69).

5. Petitioners submitted with the answers to the interrogatories several affidavits relating to Schwimmer's competency. The principal affidavit was that of Dr. Nathan S. Kline, who made a psychiatric examination of Schwimmer on December 7, 1958. He stated that during forty-five minutes of intense questioning the patient remained completely clear and well oriented and his memory for past events was excellent (R. 217–218). The following conclusion was stated (R. 218):

> It is my considered judgment that Mr. Schwimmer, when questioned under suitable circumstances, is fully capable of understanding questions asked of him and that his memory and recall are adequate to reply to such questions completely.

6. The district court denied the motions for new trial on March 4, 1959, giving its reasons in a written opinion (App. 76–91). The court of appeals affirmed. 271 F. 2d 333; App. 92–98.

ARGUMENT

1. The rule of this Court as to review of the grant or denial of a defense motion for a new trial based on newly discovered evidence has been explicitly stated in *United States* v. *Johnson*, 327 U.S. 106. There, the Seventh Circuit had reversed a trial court's judgment denying such a motion. The Court granted certiorari for the reason that it is "important for the orderly administration of criminal justice that findings on conflicting evidence by trial courts on motions for new trial based on newly discovered evidence remain undisturbed except for most extraordinary circumstances". 327 U.S. at 111. The Court not only reversed the court of appeals and reinstated the judgment of the trial court, but it also held that the defendant's appeal "was so devoid of merit that it should have been dismissed" (327 U.S. at 111). The reason for this ruling was stated at pages 111–112:

> But it is not the province of this Court or the circuit court of appeals to review orders granting or denying motions for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact. *Holmgren* v. *United States*, 217 U.S. 509; *Holt* v. *United States*, 218 U.S. 245; *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, 481. While the ap-

> pellate court might intervene when the findings of fact are wholly unsupported by evidence, *cf. United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 247; *Glasser* v. *United States*, 315 U.S. 60, 87, it should never do so where it does not clearly appear that the findings are not supported by any evidence.

In this case, Judge Nordbye carefully reviewed the testimony of Schwimmer which petitioners proffered on this motion for a new trial, and concluded in the end that a jury would not give "any weight" to this additional evidence (App. 91). The judge viewed the answers in the deposition as frequently "incoherent and vague" (App. 81); held that certain crucial testimony "is so patently contradicted by his other answers to the interrogatories that no credence can be placed thereon" (App. 82); ruled that the deposition testimony "has not weakened the basis for the admissibility" of Exhibit 100-J (*supra*, p. 6) "as relevant and competent evidence as to each of" the petitioners (App. 83; see also App. 86); held that certain other testimony on which petitioners rely "merely assumes to corroborate testimony which was given at the trial" and "[a]t best, the alleged corroboration is of questionable probative value" (App. 85), and that the "greater portion" of the testimony "of co-conspirator Schwimmer" "is merely corroborative or impeaching" (App. 89); and, finally, characterized Schwimmer as "the arch conspirator in the scheme and plan condemned by the jury", "an admitted perjurer" whose "motives from the beginning were venal and corrupt", a "discredited witness" (App. 90). It was

on this basis that Judge Nordbye denied the motion. As shown in the Statement, *supra*, pp. 6–12, and in the discussion, *infra*, pp. 20–23, there was ample support for his findings and conclusion. Accordingly, the rule of the *Johnson* case squarely applies.

Petitioners challenge the conclusiveness of Judge Nordbye's findings on the ground that he was not the trial judge, pointing to the reference in *Johnson*, 327 U.S. at page 112, to the trial judge's knowledge of the unfolding of the case from day to day. It is true that the death of Judge Hulen and the substitution of Judge Nordbye, under Rule 25, F.R. Crim. P., prevented the determination of the post-trial motions from being made by the judge who presided at the trial. However, contentions based upon this fact were extensively litigated on the first appeal, and held not to necessitate a new trial. *Connelly v. United States*, 249 F. 2d 576, certiorari denied, 356 U.S. 921, rehearing denied, 356 U.S. 964. Petitioners are attempting to revive the same arguments in the present proceeding. It is undoubtedly preferable to have post-trial motions ruled upon by the judge who heard the evidence originally, but the turn of events may make such a review impossible. Here, the substitution of judges was of diminished importance because of the nature of the prosecution's evidence. It was virtually all documentary and there was no question of the credibility of the witnesses identifying it. Judge Nordbye's painstaking study of the record of the six-weeks trial was commented upon by the court of appeals on the original appeal, 249 F. 2d at pages 579–580, and is evidenced in the present proceeding by

the fullness of the hearings and by the care and accuracy of his opinion (App. 76–91). While the nature of such documentary evidence theoretically makes possible a fuller review by an appellate court, it is obvious that Judge Nordbye has, and must necessarily have, a far greater grasp of this case than an appellate tribunal could have.

2. The main attack is upon the standard petitioners say that Judge Nordbye applied in ruling on the motion, *i.e.*, "whether or not it is probable that, if a new trial were granted, these defendants, with the addition of this newly discovered evidence to the present record, would be acquitted" (App. 81). But there is no occasion in this case for the Court to determine whether that criterion is appropriate for all motions for a new trial on the basis of new evidence. In the first place, each petitioner alleged in his motion that, if Schwimmer's testimony had been available at the trial, "he should have won an acquittal and been exonerated by the Court and jury instead of convicted" (R. 7, 51), thereby framing the issue in the terms which they now criticize the district court for restating in their own terms. Second, although Judge Nordbye did frame the test in terms of probable acquittal on a new trial, his ultimate conclusion went beyond that standard: "It seems *inconceivable* that the additional evidence of the one who spawned the plan and scheme to corrupt government officials could have *any weight* in producing a verdict other than that which was returned by the jury" (App. 91; emphasis added). That final conclusion, as well as the subsidiary findings throughout the opinion and its entire

tone, meet the loosest standard for which petitioners now contend. Thirdly, the possible difference in criteria applied by different courts—to which this Court has adverted in *Johnson*, 327 U.S. at p. 111, fn. 5, and in *Mesarosh* v. *United States*, 352 U.S. 1, 9, fn. 4; 12, fn. 6—mainly has significance where it is claimed that an important Government witness perjured himself at the trial. But where, as here, the newly discovered evidence does not go to a claim of perjury or recantation, and particularly where it is cumulative or impeaching and the case is non-capital, there has been far less contrariety of expression. See footnote 5, *infra*, p. 18.

Nor are petitioners correct in assuming that *Griffin* v. *United States*, 336 U.S. 704, 708–709, has formulated a lesser standard which calls for reversal in this case. There, the Court stated, in remanding to the District of Columbia Court of Appeals a first degree murder case for determination of the rule to be locally applied as to admissibility of uncommunicated threats in support of a plea of self-defense:

> Were the Court of Appeals to declare that the controverted evidence was admissible according to the law prevailing in the District, it would have to consider further whether it would not be too dogmatic, on the basis of mere speculation, for any court to conclude that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before it. * * *

There is no indication from this language that the Court intended to state a formula applying to all motions for a new trial. The Court was dealing with

an offense involving a mandatory death penalty, where the government had expressly conceded that a greater liberality should be extended because a human life was in the balance, and that a new trial should be granted if a reasonable possibility existed that the new evidence would result in the return of a different verdict.[4] It is quite evident that the Court was disposing of the capital case before it, but was not attempting to lay down an unbending rule that should govern all cases of all types. If it had intended to establish a general rule for all cases, the court would undoubtedly have discussed the various lower federal court and state cases, especially since the very great weight of authority in cases such as this supports the standard which petitioners themselves invoked in their motions (see p. 16, *supra*).[5]

---

[4] Noting this concession, the dissent (which would have had this Court itself determine that the evidence was admissible) stated at page 724: "If the evidence is admissible, a motion for a new trial should be granted. A contrary determination would be an abuse of discretion, for there is manifestly a reasonable possibility that the jury would lessen the verdict of first-degree murder."

[5] *Mesarosh* v. *United States*, 352 U.S. 1, 9, carefully distinguishes the situation there presented from motions for a new trial initiated by the defense under Rule 33, F.R. Crim. P.—citing *Johnson*, *supra*, 327 U.S. 106, as well as *United States* v. *Johnson*, 142 F. 2d 588, 592 (C.A. 8), certiorari dismissed, 323 U.S. 806, the case so extensively criticized by the petitioners here.

In cases where the newly discovered evidence consists of something other than alleged perjury, the lower court decisions hold that the court should not order a new trial unless it is convinced that consideration of the new evidence by the jury and a new trial would probably result in a different verdict. *Brandon* v. *United States*, 190 F. 2d 175, 178 (C.A. 9); *Thompson* v. *United States*, 188 F. 2d 52 (C.A.D.C.); *Heald* v. *United States*, 175 F. 2d 878, 883 (C.A. 10), certiorari denied, 338 U.S.

In particular, petitioners plainly err in regarding the language used in *Griffin* as a test designed to be applicable to all cases, and automatically calling for a new trial whenever newly discovered evidence is presented as to which a jury *might* attach significance. This is merely another way of saying that, if the evidence is admissible and relevant, there must be a new trial, a standard rejected by *Johnson*, 327 U.S. at pages 110, 113. Such a test could easily call for repeated new trials and, especially in view of the liberal two-year period in which such a motion may be filed, could extend the final disposition of a case indefinitely. Speaking of the liberal time limit provided in Rule 33, the Court said in *Johnson*, at pages 112–113:

> It is obvious, however, that this privilege might lend itself for use as a method of delaying enforcement of just sentences. Especially is this true where delay is extended by appeals lacking in merit. This case well illustrates this possibility. While a defendant should be afforded the full benefit of this type of rectifying motion, courts should be on the alert to see that the privilege of its use is not abused. One of the most effective methods of preventing this abuse is for appellate courts to refrain from re-

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859; *Weiss* v. *United States*, 122 F. 2d 675, 691 (C.A. 5), certiorari denied, 314 U.S. 687; *Johnson* v. *United States*, 32 F. 2d 127, 130 (C.A. 8); *United States* v. *Hiss*, 107 F. Supp. 128, 136 (S.D.N.Y.), affirmed, 201 F. 2d 372 (C.A. 2), certiorari denied, 345 U.S. 942; *Murphy* v. *United States*, 198 F. 2d 87 (C.A.D.C.); *United States* v. *Rutkin*, 208 F. 2d 647 (C.A. 3); *Pitts* v. *United States*, 268 F. 2d 808 (C.A. 9); see *United States* v. *Johnson*, 327 U.S. 106, 110, fn. 4. This has also been the rule in the states. See the Brief for the United States in *Griffin* v. *United States*, No. 417, Oct. Term, 1948, p. 20, fn. 6.

viewing findings of fact which have evidence to support them. The circuit court of appeals was right in the first instance, when it declared that it did not sit to try *de novo* motions for a new trial. It was wrong in the second instance when it did review the facts *de novo* and order the judgment set aside.

3. For these reasons, we do not regard it as a part of the duties of this Court to review the facts in this case *de novo,* but, since the testimony of Schwimmer on his deposition has been depicted as being of such vital significance, we consider it in its context.

Viewed as a whole, Schwimmer's attempted explanations of Exhibit 100–J (*supra,* pp. 6 *ff*) do more to incriminate than to exculpate petitioners. We do not stop to point out the many conflicts in his testimony, both within the deposition itself and within his former testimony before the grand jury, or the difficulty in piecing out any connected account from his disjointed answers. One thing is quite clear from his testimony as to this exhibit—that he did purchase a valuable oil royalty for petitioner Connelly from the $10,000 advanced by his client. His conflicting explanations as to what was intended to be done with the remainder of the fund do not detract from the impropriety of that purchase.[6] Although it is claimed that the purpose of entering this transaction on the books was for "income tax procedure," Schwimmer was unable to state what taxes were paid on the transaction.

[6] Although the *Sachs* case was not dropped, but proceeded to a conviction, there is no evidence that the remainder of the $10,000 was ever returned to the client.

His testimony as it related to the transaction involving petitioner Caudle is likewise inculpatory. He states that it was his idea for the papers and checks for both petitioners to be sent to his Kansas City office, although he could not explain why this arrangement was made. He "presumes" that he and possibly his secretary indorsed Caudle's name to some of the checks and admits the involved transaction whereby three of the Caudle royalty checks were used by Schwimmer to buy a cashier's check of equal amount which he held for a year and then negotiated in Puerto Rico—the explanation for which he cannot now give. His answers to the questions relating to the correspondence with Chris Rhodes concerning the Caudle oil royalty purchase, and the ensuing complaints as to delay in receiving the royalty checks, would inevitably be hurtful to the defense.

A large proportion of Schwimmer's answers were that he did not know or did not remember. It would seem apparent from all the evidence as to his mental condition, including his own admissions on that subject to the grand jury long before he suffered any of these paralytic strokes, *supra*, p. 4, fn. 2, that Schwimmer's memory was gravely defective. It would be highly inappropriate to order a new trial to hear the disconnected, conflicting, and hazy answers given by a witness deeply involved, as is agreed by all parties, in grave improprieties and whose mental condition has come to match his physical frailty. The record amply supports the "strong conviction" expressed by Judge Nordbye (App. 91) that the testimony of this witness "is merely a vehicle utilized by the defend-

ants to obtain another trial, rather than to use his testimony in their behalf with the expectation that, in light of the present record, it would have sufficient weight with a jury to bring about an acquittal."

4. Finally, if the court should reach that issue, there was no abuse of discretion by the trial court in its appraisal of Schwimmer's credibility. This appraisal was that the witness was an admitted perjurer who had spawned a plan to corrupt government officials and that reliance upon his testimony would have the effect of poisoning the minds of a jury against petitioners (App. 90–91).

The unreliability of the witness is obvious by a comparison of his testimony before the grand jury (*supra*, pp. 6–7) and his different testimony on this deposition (*supra*, pp. 8 *ff*). The court's characterization of the witness is not far different from that expressed by petitioners at various stages of this litigation.[7] As a judge charged with the duty of

[7] At page 85 of appellants' original brief in the court of appeals, they say: "Schwimmer's presence poisoned the atmosphere of the trial against all defendants and the ensuing prejudice was aggravated when a mistrial was declared as to him." Page 86 of the same brief: "The specter of guilt hovered in the mind of the jury. But the defendant who had spawned the specter was no longer a defendant." The Connelly petition for a writ of certiorari (No. 739, October Term, 1957), following the adverse decision of the court of appeals, said, p. 33: "But Schwimmer was gone and petitioner, with Caudle, was left to bear the brunt of a jury aroused by the devastating evidence deeply inculpating Schwimmer." Page 34 of this petition: "But Judge Nordbye had not been in the courtroom during the trial and could, therefore, only guess as to the effect which Schwimmer, and the specter of guilt he had spawned, had had on the jury."

In the court of appeals on this motion for a new trial,

evaluating the weight of the proffered evidence in order to determine whether his discretion should be exercised in favor of awarding a new trial (see *supra*, pp. 13–16), Judge Nordbye necessarily had to consider the record as to this witness, which amply supported the view he took.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM RICHARD WILKEY,
Assistant Attorney General.

KIRBY W. PATTERSON,
Attorney.

MARCH 1960.

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petitioner Caudle's brief, page 21, said: "This defendant would be the last to vouch for the past reputation of Schwimmer, since it is because of Schwimmer that defendant finds himself in his present predicament. * * * In spite of his shady past, there are certain facts which have occurred since Schwimmer committed those unethical acts." Petitioner Connelly's brief in that court, page 29, states that Schwimmer's deposition "may have substantiated, rather than disproved the charge of perjury * * *."

U.S. GOVERNMENT PRINTING OFFICE: 1960

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Office Supreme Court, U.S.
FILED
FEB 12 1960
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

Nos. 704-705

MATTHEW J. CONNELLY and T. LAMAR CAUDLE,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX

To Petitions for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

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In the
United States District Court of Missouri,
Eastern Division.

The United States of America,

Plaintiff,

- against -

Matthew J. Connolly and
T. Lamar Caudle,

Defendants.

STATEMENT UNDER OATH OF HARRY I. SCHWIMMER, taken before a Notary Public of the State of New York, at the home of the witness, 4 Peter Cooper Road, New York, New York, on the 3rd day of June, 1958, at 2:15 o'clock p. m.

Present:

Francis Adams, Esq.,

Paul B. Rava, Esq.

Mr. Adams: Mr. Schwimmer, as you know, I am here with Mr. Paul B. Rava, who is a member of the firm which is Mr. Connolly's counsel of record in this case, and I am appearing here as a colleague of Mr. Rava, and of counsel to Mr. Connolly and his firm for the purpose of taking this statement from you.

We understand that you are not now in good health.

The Witness: Yes.

Mr. Adams: And I want to make it clear to you that I want you to take all the time that you need, and I don't want to put any strain upon you. I want you to feel as relaxed and as comfortable as possible in the course of giving this statement.

Now, Mr. Schwimmer, I would ask you to take the oath from the reporter here, who is a Notary Public.

Will you administer the oath, Mr. Reporter?

HARRY I. SCHWIMMER,

having been first duly sworn by the Notary Public, was examined and testified as follows:

Mr. Adams: If you will, make a note on the record that at this point, the oath was administered by the Reporter.

May it appear upon the record that this statement is being taken in the City of New York, at 4 Peter Cooper Road, apartment 7-H, which is Mr. Schwimmer's apartment.

Examination by Mr. Adams:

Q. Will you state your full name?

A. Harry I. Schwimmer.

Q. And your address is as I have stated it on the record?

A. Yes.

Q. How long have you lived in New York?

A. About three or two years.

Q. You will recall that Mr. Rava and I came here yesterday and discussed with you the giving of a statement by you.

A. Yes.

Q. You are one of the people who were named as defendants in an indictment in the United States Court in St. Louis, Missouri, which was filed in December of 1955?

A. Yes.

Q. And you yourself are a lawyer?

A. Yes.

Q. Prior to the filing of that indictment, and as indicated in that indictment, you were the lawyer for a man named Sachs?

A. Yes, I was.

Q. You were a lawyer for him in connection with certain tax problems that confronted him?

A. Yes.

Q. And you recall that the case resulting from that indictment that I mentioned came on for trial in St. Louis in May, 1956?

A. Yes, it did.

Q. That was sometime in 1956, in May, the record shows; is that right?

A. Wait a minute——

Q. 1956, in May, is when the case came on for trial; is that right?

A. Yes.

Q. You recall that during the trial, the record shows, on May 28, 1956 you sustained a heart attack?

A. Yes.

Q. Do you recall that as a result of that heart attack a mistrial was declared as to you?

A. Yes, I do.

Mr. Adams: I think I may say here that I might not have the date of the heart attack correct. My notes indicate that the mistrial was declared on May 28, 1956, and I think the record would show that the heart attack took place a few days before that.

The Witness: Yes.

Q. Now, of course you are aware that that indictment, at least as far as you are concerned, is still pending?

A. Yes, I am.

Q. At the time that you suffered this heart attack, did you go to a hospital in St. Louis?

A. Yes, to the hospital.

Q. And were you there a few days?

A. No, about twelve or—some such date as that.

Q. In the neighborhood of twelve days; is that what you are saying?

A. Yes.

Q. Then, after a further time in St. Louis, did you return to New York?

A. Yes, I did.

Q. Did there come a time when you suffered a stroke?

A. Yes.

Q. After you had the heart attack?

A. Yes, I did.

Q. Was that in New York?

A. Yes, it was.

Q. Can you give us the approximate month and year?

A. It was in October.

Q. October of 1956?

A. Of 1956.

Q. Mr. Schwimmer, did that stroke have any effect upon your power of speech?

A. Yes, it did; it almost left me speechless.

Q. Within the past year or two have you had a loss in your family also?

A. Yes.

Mr. Adams: I am sorry to have to ask you these questions, Mr. Schwimmer, but you can see that it is necessary to do so.

The Witness: Yes.

Q. That loss was of your wife; is that correct, sir?

A. Yes.

Q. From the time that you had the heart attack, going back to the time of the trial and continuously on to the present, have you been under the care of physicians?

A. Yes, I have been.

Q. Could you give us the name of your doctor?

A. Mr. Irving Wright and Dr. Rusk.

Q. When you refer to Dr. Rusk, you mean the Dr. Rusk who was at the Bellevue Rehabilitation Center?

A. Yes.

Q. Have you been taking treatments there?

A. Yes.

Q. At that Center?

A. Yes.

Q. Have those treatments looked toward restoration of your faculties, including the faculty of speech?

A. Yes. I have mostly recovered about 50 per cent of my speech.

Q. Now, there come a time when there was some improvement in your power of speech?

A. Well, about three or four months ago I made an improvement on my speech—three or four months ago.

Mr. Adams: By the way, may I state on the record that the taking of this statement began at approximately 2:15.

Q. When you referred a moment ago, Mr. Schwimmer, to the 50 per cent improvement in your speech, you were referring to what took place within the past three or four months?

A. Yes.

Q. Prior to that time wasn't your power of speech almost completely impaired?

A. Yes, it was.

Mr. Adams: Now, Mr. Schwimmer, I want to repeat that I want you to take your time and go as slowly as you like. I do not want you to feel under any unnecessary strain in the taking of this statement.

(At this point there was a brief recess in the proceedings.)

By Mr. Adams:

Q. Mr. Schwimmer, do you know Matthew J. Connolly?

A. Yes, I do.

Q. Could you estimate when you first met him?

A. About in nineteen forty——

Q. Could we say in the forties?

A. Yes.

Q. Would it be fair to say in the early forties?

A. Yes.

Q. At that time in the course of your practice as a lawyer and also in connection with public matters did you have occasion from time to time to go to Washington?

A. Yes, I did.

Q. And some of these matters that I have referred to were what might be called pro bono publico matters; is that correct?

A. I don't know what you mean.

Q. Well, what I mean is public matters not connected with your private law practice.

A. Yes.

Q. Could you indicate to us any of the matters of that kind that took you to Washington?

A. Well, the Israel situation.

Q. Are you referring, Mr. Schwimmer, to the matter of the partition of Palestine?

A. Yes.

Q. That was a matter that concerned you as a citizen?

A. Yes.

Q. Can you now recall any other public matters that took you to Washington?

A. The German Consul.

Q. And also was there something to do with atomic energy?

A. Atomic energy. I had much to do with atomic energy.

Q. And was there some movement which I think went by the name of "Democracy and Unity" which concerned you?

A. Yes.

Q. And there were other similar matters?

A. Yes, there were.

Q. Were there also legal professional matters which took you to Washington in this period?

A. Yes, there were.

Q. Other than the representation of Mr. Sachs, can you recall any professional matters that took you to Washington?

A. Well, helium matters, much of Crown matters.

Q. What kind of company was the Crown Company?

A. That was a drug store chain.

Q. You referred, Mr. Schwimmer, to helium as being one of the matters that concerned you.

A. Yes.

Q. I'm going to show you a photostat of a paper which was marked in the trial Plaintiff's Exhibit 102, and ask you if you will look at that letter.

(Handing letter to witness.)

The Witness: I can't read the letter.

Mr. Adams: Is it difficult for you to read it?

The Witness: Yes.

Mr. Adams: Would you like me to read it to you?

The Witness: Yes, I would.

Mr. Adams: This is a photostate of a letter dated January 5, 1948. It is addressed to "Honorable Matthew J. Connolly, White House, Washington, D. C.

"Dear Matt: Tom informed me of your kindness in offering to help me, which I sincerely appreciate.

"It was my original plan to leave for Washington sometime this week. However, unfortunately my wife's father passed away unexpectedly, and of course it will be necessary for me to stay here for a little while longer.

"I hope now to leave Kansas City about the 17th of this month, and if I may I will call or wire you as to the date when I will be in Washington.

"With fondest regards to you all, I am Sincerely, (blank), Harry I. Schwimmer."

That is typed. And on the left are the initials in capitals, "HIS:er," and at the extreme bottom left-hand page it shows "Grand Jury Exhibit 72, 7/18/55", and the initials "J. M."

By Mr. Adams:

Q. Now, do you recall that letter, Mr. Schwimmer?

A. Yes.

Q. Was that a letter that you sent to Mr. Connolly?

A. Yes, it was.

Q. The first paragraph I will read again, and it says here: "Tom informed me of your kindness in offering to help me, which I sincerely appreciate."

Now, do you remember what he is referring to?

A. The helium matter.

Q. In this letter the reference then to Mr. Connolly's kindness in offering to help was a reference to this helium matter which concerned you professionally; is that correct?

A. Yes, it was.

Q. I notice, Mr. Schwimmer, that the paragraph refers to "Tom." Would you state who "Tom" was?

A. He was a friend of mine.

Q. Can you give his name?

A. Tom Evans.

Q. Had you known him for some time?

A. Well, for about twenty or twenty-five or thirty years from now.

Q. Mr. Schwimmer, in connection with your visits to Washington, did you from time to time ask Mr. Connolly to make appointments for you?

A. Yes, I did.

Q. Did you ask him to make introductions?

A. Yes, I did.

Q. Now, in the record in this case, the evidence indicates that you asked Mr. Connolly to make appointments for you at the Bureau of Internal Revenue and the Justice Department at various times.

A. In what case?

Q. In connection with the Sachs case. Is that correct?

A. Yes, it is.

Q. Also, did you in connection with the Sachs case ask Mr. Connolly to arrange an adjournment or continuance of some conferences that were scheduled there?

A. Yes, I did. That was because of my heart attack.

Q. And Mr. Schwimmer, prior to your heart attack at the trial in St. Louis, you had had an earlier heart attack going back to 1948 or 1949; is that right?

A. Yes, I did, in 1948.

Q. Other than to request Mr. Connolly to make these appointments as you have stated, did you ever ask him to do anything else with reference to the Sachs case?

A. No, I did not.

Q. Did you at any time discuss with Mr. Connolly any of the facts involved in the Sachs case?

A. No, I did not.

Q. Did you ever go into the merits of that professional business with him at all?

A. No, I did not.

Q. Did you ever ask him in connection with the Sachs affair to intercede with anyone in the government on behalf of you or of Mr. Sachs?

A. No, never. Never did, not once.

Q. Did you at any time in connection with that case make any promises, express or implied, to Mr. Connolly in connection with it?

A. No, I didn't.

By Mr. Adams:

Q. In the course of your discussions with other officials involving the Sachs case, I suppose you mentioned that you knew Mr. Connolly?

A. Yes, I did.

Q. Was that with or without Mr. Connolly's knowledge?

A. Without his knowledge.

Q. Now, Mr. Schwimmer, in the course of your own private business—and I am making a distinction there between your private business as an individual and your practice as a lawyer—did you maintain any private record or book with relation to certain transactions?

A. No.

Q. I perhaps have not made it clear, but I was referring to what I have here as a photostatic copy of something which bears on its outer cover the word "Journal."

A. Yes.

Q. That is what I was referring to in the question.

A. Yes, that was what I maintained.

Q. That was what I intended to ask you about as the private record.

A. Yes.

Q. Now, this photostatic copy of this book appears from the record to have been marked Plaintiff's Exhibit 100 for identification.

A. Yes.

Q. I show it to you, and ask you if you recognize it as a copy of the private record to which you have referred.

A. Yes, this is a copy.

Q. Now, without going into the details of what is contained in that record, did you make a practice of putting down there items like charitable deductions, doctors' expenses, and so on?

A. Yes, I did.

Q. And was that in connection with your income tax records?

A. Yes, that was in connection with my income tax records.

Q. And the book was kept by you as a private book for income tax purposes; is that correct?

A. Yes.

Q. Mr. Schwimmer, there was marked in evidence at the trial as Exhibit 100-J for plaintiffs, part of the page in that book, page 22 a photostatic copy of which I now show you (handing to the witness).

Mr. Adams: Could I interrupt you a moment, Mr. Schwimmer, before you finish examining that?

The Witness: Yes.

By Mr. Adams:

Q. I wanted to ask you a question. This appears in your handwriting; is that correct?

A. Yes.

Q. It appears from the evidence in this case, and it was conceded, I am informed, by counsel for Mr. Connolly, on the record, that the initials there, M. C., refer to Matthew Connolly. I wanted to ask you this question: I notice that that entry reads: "Pd. out, Oil royalty, M. C. 4,200."

And I also notice at the top of this Exhibit 100-J, there appears: "Oct.—49."

Had you purchased any oil royalty in 1949, in October, for $4,200?

A. No.

Q. This entry, I take it, was made for your income tax purposes?

A. Yes.

Q. Then was the entry made sometime after October, 1949?

A. Yes, it must have been.

Q. Can you state whether it was made in November, or December, or at some later time; do you know?

A. I don't know.

Q. But do you now state that it was made sometime after October and that you cannot now state exactly when it was made?

A. Yes.

Q. Now I notice also these words in this entry: "Held in escrow to be paid out depending on whether I. Sachs case is dropped—5,800." Did that refer to $5,800?

A. Yes.

Q. Now, the word "escrow" is used there. When you made that entry what did you intend to record with reference to escrow?

A. Well, that was the business of it going back to Sachs.

Q. I want to ask you then this question: If the Sachs case was not dropped, what happened to the $5,800?

A. It goes back to Sachs.

Q. Now this part, this whole entry, was made sometime

after October, including these words that I have just been discussing?

A. Yes, those words are in November or December.

Q. Or possibly later. You said, I think, before that you couldn't say exactly, is that right?

A. Yes.

Q. If the case were dropped, what was to happen to that amount of money, according to this entry?

A. I was to keep it.

Q. There is a reference above the two entries that I have read as follows: "Shu-Stiles—$10,000." Is that Shu-Stiles the company of Mr. Sachs?

A. Yes, it is.

Q. And was that $10,000 received by you from that company on account of Mr. Sachs?

A. Yes, it was.

Q. For the year 1949, did you report that $10,000 as income to you?

A. No.

(At this point, there was a brief recess.)

Q. Now, with further reference to this Exhibit 100-J, did you at any time ever show these entries to anyone who was named in this indictment?

A. No.

Q. Did there come a time, Mr. Schwimmer, when you had a discussion with somebody about the possibility of Mr. Connolly making an investment in oil royalty?

A. Yes, I did.

Q. Whom did you discuss that with?

A. Tom Evans.

Q. And then did there come a later time when you discussed this same matter with Mr. Evans and someone else?

A. Matt Connolly.

Q. So that on the second occasion, Mr. Evans and Mr. Connolly were present?

A. Yes. And that was at the Mulbach Hotel in Kansas City. That was in the President Suite.

Q. Was there a time when you paid for an oil royalty for Mr. Connolly?

A. Yes, I did.

Q. What was the amount that was actually paid for that royalty?

A. $3,600.

Q. Did you, at the conference in the Mulbach Hotel, disclose to Mr. Connolly what the actual cost of that oil royalty had been?

A. No, I did not.

Q. What was your reason for not telling Mr. Connolly about that?

A. Well, I made the amount $750, and that is what I supposed that he would pay.

Q. Did your reasons include anything with respect to your ability to make a cheap investment?

A. Yes, that was what it was, a cheap investment for Matt Connolly. But Tom Evans knew what it actually cost.

Q. Did there come a time when you advised Mr. Connolly to sell that particular royalty?

A. About two or three years later.

Q. Actually, I think the evidence shows that the money was advanced originally by Mr. Evans, and that you eventually paid Mr. Evans back yourself; is that correct?

A. Yes, I did.

Q. Did you ever tell Mr. Connolly that you had paid

A. No, I didn't.

Q. (Continuing) —— Mr. Evans?

A. No, I didn't.

Q. Now I will ask you a somewhat general question, Mr. Schwimmer. Did you ever have any agreement of any kind with Mr. Connolly in any way relating to the Sachs case?

A. No, I didn't. I certainly did not.

Q. Mr. Schwimmer, do you plan to remain in New York?

A. Yes.

Q. And if it is necessary, will you be available for giving your deposition, or any further statement that is necessary here?

A. I don't know.

Q. Well, that, I suppose, would depend upon your health.

A. Yes.

Q. Assuming that your health is all right, is what I meant to say.

A. I don't know what I can say. My doctor would have to say that.

Mr. Adams: Yes, I understand that.

May the record show that we concluded taking the statement at 3:05.

(Whereupon, at 3:05 p. m., the statement was concluded.)

Harry I. Schwimmer.

Sworn to before me this 4th day of June, 1958.

Thomas F. Lambiase.

(Seal)

Thomas F. Lambiase
Notary Public for the State of New York
Qualified in New York County
No. 31-2239250
Commission Expires March 30, 1959

Certificate.

State of New York, } ss
County of New York. }

I hereby certify that the foregoing is a true and accurate transcript of the statements, questions and answers, made in my presence and noted by me on June 3, 1958.

Thomas F. Lambiase.

In the United States District Court of Missouri,
Eastern Division.

The United States of America,
Plaintiff,
against
Matthew J. Connelly and T. Lamar Caudle,
Defendants.

STATEMENT UNDER OATH OF HARRY I. SCHWIMMER, taken before a Notary Public of the State of New York, at the home of the witness, 4 Peter Cooper Road, New York, New York, on the 11th day of June, 1958, at 2:45 o'clock p. m.

Present:

Charles B. Caudle, Esq.;

William M. Nicholson, Esq.

Proceedings:

Mr. Caudle: Mr. Reporter, will you please let the record show that Charles B. Caudle and William M. Nicholson, attorneys, of 718 Johnston Building, Charlotte, North Carolina, make their appearances in this matter in behalf of, and at the request of, Mr. John Hooker of Nashville, Tennessee, counsel of record for T. Lamar Caudle; and that we do so with the full knowledge of, and the approval of, Mr. Morris Schenker of St. Louis, Missouri, counsel of record for Mr. Harry I. Schwimmer, in the criminal proceedings herein entitled, now pending before the United States District Court in St. Louis.

Mr. Schwimmer, I believe that you were previously interrogated by Messrs. Paul B. Rava and Francis Adams, attorneys for Mr. Matthew J. Connelly, on June 3, 1958.

as the record will show upon the filing of such interrogatories with the Federal District Court in St. Louis.

We are here today to submit some questions to you concerning your previous professional and personal association with Theron Lamar Caudle. We realize that you have been extremely ill and are at this time a very sick man, and we wish to assure you that we will exercise every effort to make this proceeding as easy as possible on you. Please take your time in answering the questions to be submitted to you, and if at any time you desire to rest for a while, please do not hesitate to so indicate.

Please let the record show that this proceeding was had in the residence of Mr. Harry I. Schwimmer at 4 Peter Cooper Road, Apartment 7-H, in New York City, at 2:50 p. m., June 11, 1958.

HARRY I. SCHWIMMER,

having been first duly sworn by the Notary Public, Thomas F. Lambinse, was examined and testified as follows:

Examination by Mr. Caudle:

Q. Mr. Schwimmer, I understand that you were previously interrogated on June 3, 1958, by Messrs. Francis Adams and Paul B. Rava, attorneys, on behalf of Mr. Matthew J. Connelly. This interrogation and the record of the proceedings in St. Louis show that during the years 1948, 1949, 1950 and 1951 you were counsel for Mr. Irving Sachs in an income tax matter before the Bureau of Internal Revenue and the Tax Division of the Justice Department in Washington. Is that correct?

A. Yes, it is.

Q. During this period did you on occasion discuss this tax matter with Theron Lamar Caudle, the then head of the Tax Division of the Department of Justice?

A. Yes, I did.

Q. At such times as you discussed this matter with Caudle, was there anyone else present?

A. Lamar Caudle, and three others besides Mr. Caudle: Smith, Cunningham, and who else I don't remember.

Q. Was there always someone present when you discussed this matter with Caudle?

A. Yes; there was.

Q. Did you on any such occasion, upon the conclusion of your conference, inquire of Caudle as to whether he knew of any good investment?

A. Yes.

Q. What, if any, information did he give you in this regard?

A. Merritt-Chapman & Scott. He gave me the name—or that they would declare a dividend, which they did.

Q. Did you act upon this information, and if so, to what extent?

A. I bought a hundred or two hundred shares of stock with that company.

Q. What were the results, that is to say, what happened with the company after that time?

A. Well, they paid a dividend, and I have still got the shares of stock.

Q. Did you later tell Caudle that you had made money on this investment?

A. Yes, I did.

Q. Did you at that time tell Caudle that you had profited to the extent that you would like to return the favor to him?

A. Yes, I did.

Q. What did Caudle say to you about his accepting favors from you? That is, did he decline your offer?

A. Yes, he did decline it. He did so.

Q. Did you later make an oil purchase in Caudle's name?

A. Yes, I did.

Q. Did Caudle know that you were negotiating the oil purchase in his behalf?

A. No, he did not.

Q. During these oil purchase negotiations did you write certain letters to a Chris Rhodes?

A. Yes, I did.

Q. Did Caudle know of these letters, and did he authorize you in any manner to make such negotiations?

A. No, he did not.

Q. The trial record shows that you, under date of April 4, 1950, wrote a letter to Caudle advising him of this purchase. Is that correct?

A. Yes, it is.

Q. Mr. Schwimmer, I will show you a letter as set forth in the brief filed in the case on appeal, in Appendix A thereof, in Section 6.

(Handing to witness.)

The Witness: I can't read the letter.

Q. You can't read the letter?

A. Can't read the letter.

Q. For your information, this letter indicated that Caudle knew of this transaction. Did he?

A. No, he did not.

Q. Also, your letter to Mr. Chris Rhodes indicated that Caudle knew of your dealings with Rhodes. Did he?

A. No, he did not.

Q. The record shows that on or about the 6th day of August, 1950 you telephoned Caudle, from Kansas City to Caudle's home in Washington, and informed him at that time of the oil purchase. Is that correct?

A. What date is that?

Q. On or about August 6th or 7th, 1950.

A. Yes, that's correct—or that is about correct.

Q. Was Caudle upset and angered by this information?

A. Well, he wasn't upset, but he let me have it. He was angry with me.

Q. Did he at that time request you to take all necessary steps to have this oil interest immediately transferred out of his name?

A. Well, he said something about that.

Q. The record of the trial shows that this property was finally transferred by Caudle and his wife to you in April, 1951. Is this correct?

A. I don't know if that is correct, but it was about that time.

Q. Did Caudle, between August 6, 1950, or thereabouts, and April 19, 1951, telephone you many times by long-distance, urging you to expedite this transfer?

A. Well, I was sick, and he telephoned me two or three or four times.

Q. Did not Caudle also speak with you personally in Miami, Florida, and again at Caudle's residence in Washington, D. C., again urging you to expedite the transfer of this oil interest?

A. Yes, he did.

Q. Mr. Schwimmer, just why did you make this purchase in Caudle's name?

A. Well, I desired to help him.

Q. Was there any reason for this desire?

A. Yes. The reason for this desire was many things that —also with Merritt-Chapman & Scott—the many other things that he had risen to help me on.

Q. Did any of the matters in which you state he helped you include the Sachs tax case?

A. No, they did not.

Q. Why did you delay so long—actually for a period of eight months—before making the transfer?

A. Because of my illness, and because of various things or other.

Q. Were these things you refer to beyond your control?

A. Yes.

Q. The record of the trial shows that there were a number of dividend checks issued in Caudle's name during the period that the title to the oil property was registered in his name. Did Caudle ever receive this money, or any part of it whatsoever?

A. No.

Q. Did Caudle ever receive anything whatsoever of value, from you, Mr. Sachs, or anyone else, to your knowledge——

A. No, he never did.

Q. (Continuing) ——in regard to any association whatsoever you may have had with him?

A. No, he never did.

Q. Was there at any time any promise of reward, either express or implied, to Caudle as a consideration for a favorable ruling in the Sachs tax case?

A. No, there never was.

Q. Was there at any time any understanding, agreement or other situation, either express or implied, between you and Caudle, or between Caudle and anyone else to your knowledge, relating to a favorable decision in the Sachs tax case?

A. No, there never was.

Q. Mr. Schwimmer, you recall that during the interrogation of you by Messrs. Adams and Rava on June 3, 1958, you were asked various questions about a ledger kept by you which in part dealt with an entry therein concerning the receipt of $10,000 from Mr. Sachs by you, and also concerning listed disbursements on other things. This entry was introduced at the trial by the government and was identified as Exhibit 100-J.

Would your answers to the same questions now be the same as those given by you during the former interrogation?

A. Yes.

Q. Do you, by reference, make those questions and answers as appear in the transcript of the former interrogation a part of this present record?

A. Yes.

Q. Did Caudle ever know anything whatsoever about your financial dealings with Mr. Sachs?

A. No, he never did.

Q. Was Caudle connected in any manner whatsoever with the entry designated as Exhibit 100-J, as aforesaid?

The Witness: What was that?

Q. Was Caudle connected in any manner whatsoever with the entry designated as Exhibit 100-J that we discussed a moment ago?

A. No, he never was.

Q. Was Caudle ever promised or paid any part of this money or any other money?

A. No, he never was.

Q. If you had not become extremely ill during the trial and had not been excluded therefrom, would you have permitted yourself to be placed under oath, and thereafter given testimony therein?

A. Yes, I would have.

Q. In that event, would you have given the Court and the jury the same information as submitted by you in this interrogatory?

A. Yes, I would have.

Q. Mr. Schwimmer, if you had not been seriously ill all the time since the trial in St. Louis, and physically unable to do so, would you have willingly submitted to this form of interrogation before June 3, 1958, the date of your first interrogation?

A. Yes, I would have.

(Whereupon, at 3:15 p. m., the statement was concluded.)

Harry I. Schwimmer.

Sworn to before me this 12th day of June, 1958.

Thomas F. Lambiase.

Thomas F. Lambiase,
Notary Public for the State of New York,
Qualified in New York County,
No. 31-2239250,
(Seal) Commission Expires March 30, 1959.

Certificate.

State of New York,
County of New York, } ss.

I hereby certify that the foregoing is a true and accurate transcript of the statements questions and answers, made in my presence and noted by me on June 11, 1958.

Thomas F. Lambiase.

United States District Court, Eastern District of Missouri, Eastern Division.

United States of America,

Plaintiff,

v.

Matthew J. Connelly and T. Lamar Caudle,

Defendants.

No. 26,439 (2)

INTERROGATORIES propounded on behalf of defendant Matthew J. Connelly and defendant T. Lamar Caudle, and counter-interrogatories propounded on behalf of plaintiff The United States of America, to Harry I. Schwimmer, by Thomas F. Lambiase, a Notary Public of the State of New York, at No. 4 Peter Cooper Road, New York, New York, between the hours of 2:15 P. M. and 3:55 P. M. on Monday, September 29, 1958, and 2:05 P. M., and 3:40 P. M. on Tuesday, September 30, 1958, pursuant to order of the Court and the Federal Rules of Criminal Procedure.

Appearances:

Carl H. Imlay, Esq., Attorney for plaintiff The United States of America, Department of Justice, Criminal Division, Washington 25, D. C.

Alan Y. Cole, Esq., Attorney for defendant Matthew J. Connelly; 815 Fifteenth Street, N. W., Washington 5, D. C.

Tyree B. Harris, Esq., Attorney for defendant T. Lamar Caudle, 1106 Nashville Trust Building, Nashville 3, Tennessee.

Morris A. Shenker, Esq., Attorney for the witness Harry I. Schwimmer, 408 Olive Street, St. Louis 2, Missouri.

Also Present:

Dr. Walter Palmer, Associate of Dr. Irving S. Wright, 450 East 69th Street, New York, N. Y.

Mrs. Jacquelyn Kanter, Daughter of the witness, 4 Peter Cooper Road, New York, N. Y.

Proceedings:

Answers and deposition of Harry I. Schwimmer to the accompanying interrogatories on behalf of defendants Matthew J. Connelly and T. Lamar Caudle, and counter-interrogatories on behalf of plaintiff The United States of America, propounded to him in the above-styled and numbered cause by Thomas F. Lambiase, a Notary Public in and for the State of New York at No. 4 Peter Cooper Road, in the City, County and State of New York on Monday, September 29, 1958, between the hours of 2:15 P. M. and 3:55 P. M., and on Tuesday, September 30, 1958, between the hours of 2:05 P. M. and 3:40 P. M., pursuant to order of the Court and the Federal Rules of Criminal Procedure.

HARRY I. SCHWIMMER,

No. 4 Peter Cooper Road, New York, New York, having been first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth in answer to

the interrogatories and counter-interrogatories as hereinafter indicated, deposes and says as follows:

Interrogatories on behalf of defendant Matthew J. Connelly.

1st Interrogatory: Please state your name and address?

Answer: Harry I. Schwimmer, 4 Peter Cooper Road, New York City, New York.

2nd Interrogatory: Were you one of the defendants named in an indictment along with Matthew J. Connelly and T. Lamar Caudle in the United States District Court in St. Louis, Missouri, which was filed on December 1, 1955?

Answer: Yes.

3rd Interrogatory: Prior to the indictment were you the attorney for Irving Sachs in a case involving a charge of income tax evasion?

Answer: Yes, I was.

4th Interrogatory: Was the case in which you were a defendant with Connelly and Caudle called for trial in May of 1956?

Answer: Yes, it was.

5th Interrogatory: Was a mistrial declared as to you during the trial on account of a heart attack you suffered at the time?

Answer: Yes, it was.

6th Interrogatory: Are you aware that the same indictment is still pending against you on this date?

Answer: Yes—yes, it is.

7th Interrogatory: Over what period of time have you known Matthew J. Connelly?

Answer: Oh, about 1944—Is that right?—1944.

8th Interrogatory: In the course of your law practice and while Mr. Connelly was appointment secretary to the President of the United States did you have occasion to be in Washington from time to time on professional matters?

Answer: Yes, I was.

9th Interrogatory: And during the same period did you have non-professional matters that required your presence in Washington?

Answer: Yes. Yes, I was.

10th Interrogatory: Describe the non-professional matters that required your presence in Washington to the best of your recollection?

Answer: Well, I cannot answer this very well without looking at my files; but there was the helium matter, and the State of Israel matter and the German Consul matter. And many of these things that could—Many of these things could be ascertained by my files.

11th Interrogatory: Did you make contact with Matthew J. Connelly in connection with any of the matters referred to in Interrogatory 10?

Answer: Yes, sir.

12th Interrogatory: For what purpose?

Answer: Well, to help me on these matters.

13th Interrogatory: During the period described in Interrogatory 8 were you in Washington with reference to the Sachs tax case?

Answer: Yes, I was.

14th Interrogatory: Describe the professional matters in addition to the Sachs case that required your presence in Washington during the same period to the best of your recollection?

Answer: Well, the Israel matter, and maybe the helium matter—all of those things were in my purview of law.

15th Interrogatory: Did you make contact with Matthew J. Connelly in connection with any of such professional matters, including the Sachs case?

Answer: Well, two or three times I got in touch with Matt Connelly, but he did not know what the Sachs matter was, except that he would tell me two or three times, that is all.

16th Interrogatory: For what purpose?

Answer: The Sachs case, he just called once, Mr. Oliphant, and twice—I think so—he must have called Caudle. That is all. He just called them in making an appointment for me.

17th Interrogatory: Attached hereto is a photostatic copy of a letter which was previously marked and identified as Plaintiff's Exhibit 102 which reads as follows:

"January 5, 1948

Hon. Matthew J. Connelly
White House
Washington, D. C.

Dear Matt:

Tom informed me of your kindness in offering to help me, which I sincerely appreciate.

It was my original plan to leave for Washington some time this week. However, unfortunately my wife's father passed away unexpectedly, and, of course, it will be necessary for me to stay here for a little while longer.

I hope now to leave Kansas City about the 17th of this month, and if I may, I will call or wire you as to the date when I will be in Washington.

With fondest regards to you all, I am

Sincerely,

Harry I. Schwimmer.

HIS:er"

Do you recall having written that letter to Mr. Connelly?

Answer: Yes, I did. And that was in regard to the helium matter, that is all.

(Photostatic copy of Plaintiff's Exhibit 102 attached hereto as Appendix C, Interrogatory 17, Matthew J. Connelly.)

18th Interrogatory: Referring particular to the first paragraph of that letter which reads:

"Tom informed me of your kindness in offering to help me, which I sincerely appreciate."

Please identify the person who is referred to as Tom?

Answer: Tom Evans.

19th Interrogatory: State how long you had known him and what connection you had with him, if any?

The Witness: Who?

(Discussion off the record.

It was agreed among all counsel present that the person referred to as "him" in the 19th interrogatory was Tom Evans.)

Answer: Well, from 1939—1939, or some such date as that—I used to represent him, as legal counsel.

20th Interrogatory: What connection, if any, did he have with the Sachs tax case?

Answer: None whatsoever.

21st Interrogatory: What is it to which you refer when you state to Mr. Connelly in the letter identified as Plaintiff's Exhibit 102 that "Tom informed me of your kindness in offering to help me, ' '"?

Answer: That was the helium matter.

22nd Interrogatory: Did you ask Mr. Connelly to arrange appointments for you in connection with the Sachs case?

The Witness: What was that?

(22nd interrogatory was repeated to the witness.)

The Witness: I can't hear you—or I can't understand you.

(22nd interrogatory was repeated to the witness.)

Answer: Yes; I think it was only twice, or three times, that he helped me getting an appointment.

23rd Interrogatory: If your answer to Interrogatory 22 is in the affirmative, with whom?

Answer: Once with Mr. Oliphant, and two times with Mr. Candle—or that's at least my memory of that situation.

24th Interrogatory: At any time, did you ask Mr. Connelly to arrange to postpone any conference set up on the Sachs case?

Answer: Yes, I did. I was sick at that time, and I was in California flat on my back, and I called Mr. Connelly to ask him if he can arrange an appointment or arrange an appointment other than that day.

25th Interrogatory: Did you have any conversation about the details of the Sachs case with Mr. Connelly?

Answer: None whatsoever.

26th Interrogatory: If your answer to Interrogatory 25 is in the affirmative, relate any such conversation.

The Witness: Read that sentence over again.

(26th interrogatory was repeated to the witness.)

(25th interrogatory was repeated to the witness.)

Answer: None at all.

27th Interrogatory: Attached hereto is a photostatic copy of an exhibit which has been previously marked for identification as Plaintiff's Exhibit 100-J. Is the handwriting that appears thereon yours?

(Photostatic copy of Plaintiff's Exhibit 100-J, attached hereto as Appendix A.

27th Interrogatory of Matthew J. Connelly, handed to the witness.)

Answer: Yes, this is mine.

28th Interrogatory: If it is your handwriting, was this writing made in a record book of some kind belonging to you?

Answer: Yes, it was. It was for income tax procedure.

29th Interrogatory: What was the purpose of keeping such a record?

Answer: Income tax procedure.

30th Interrogatory: Please notice that at the top of the exhibit appears "Oct-49". Also below, there is the entry "Pd out Oil Royalty M. C. 4200." Had you purchased any oil royalty in October of 1949 for $4200?

Answer: No, I did not.

31st Interrogatory: Was the entry "Pd out Oil Royalty M. C. 4200" made before, during, or after the month of October, 1949?

Answer: Yes, it was. It was made after that period of October, 1949.

32nd Interrogatory: If you can be more definite as to the time, will you so state?

Answer: No, I can't. It was—No, I can't.

33rd Interrogatory: Referring then to the entry "Held in escrow to be paid out depending on whether I. Sachs case is dropped 5,800." Please state for whom was the $5800 held in escrow and under what conditions was it to be paid out?

The Witness: Read that sentence again.

(33rd interrogatory repeated to the witness.)

Answer: To me, after the Sachs case was dropped.

34th Interrogatory: Did you retain as your own property any or all of the $5800 referred to above?

Answer: Yes, I did.

35th Interrogatory: If your answer to Interrogatory 34 is affirmative, please state how much you retained.

The Witness: Read that over again.

(35th interrogatory repeated to the witness.)

Answer: Five thousand eight hundred dollars—No, I didn't. The amount came to, at the close of the year

(Witness made calculation on paper.)

Answer: (continuing) Six hundred and four hundred dollars—Six hundred and four hundred dollars.

The Witness: Is that true?

Answer: (continuing) Sixty-four hundred dollars—that is what I mean, sixty-four hundred dollars.

(Discussion off the record.)

Mr. Imlay: Let the record show that after colloquy between counsel Mr. Schwimmer said, "Sixty-four hundred dollars."

(Sheet of paper with calculation made by the witness attached hereto as Appendix B, Interrogatory 35, Matthew J. Connelly.)

36th Interrogatory: Did you ever report as income on your Federal return any part or all of the $10,000.00 referred to on Exhibit 100-J?

Answer: I don't know. I don't know whether I did or did not.

37th Interrogatory: If your answer to Interrogatory 36 is in the affirmative, how much, and in what year?

Answer: I don't know at all.

38th Interrogatory: Referring now to all the entries on Exhibit 100-J, did you ever show them or any of them to Mr. Connelly or anyone else named in this indictment?

Answer: No, I never did.

(At this point the witness requested a brief recess. A recess of approximately five minutes was taken.)

39th Interrogatory: Did there come a time when you did purchase an oil royalty for Matthew J. Connelly?

Answer: Yes, I did.

40th Interrogatory: If so, when?

Answer: About December 30 of that year.

41st Interrogatory: If so, what did you pay for it?

Answer: Thirty-six hundred dollars.

42nd Interrogatory: Did you have any conversation with Mr. Connelly about the cost of such oil royalty?

Answer: No, I didn't.

43rd Interrogatory: If your answer to Interrogatory 42 is in the affirmative, what did you tell Mr. Connelly about the cost of such oil royalty?

Answer: Seven hundred dollars, I told him.

44th Interrogatory: Did you at any time prior to the indictment disclose to Mr. Connelly what had been paid by you for the oil royalty?

Answer: No, I didn't.

45th Interrogatory: Did Tom Evans ever to your knowledge lend the money to Mr. Connelly to purchase the oil royalty?

Answer: Yes, he did.

46th Interrogatory: If your answer to Interrogatory 45 is in the affirmative, did you reimburse Mr. Evans the money that Mr. Connelly had borrowed?

Answer: Yes, I did.

47th Interrogatory: If so, did you tell Mr. Connelly that you had done so?

Answer: No, I did not.

48th Interrogatory: Did there come a time when you advised Mr. Connelly to sell that same oil royalty?

Answer: Yes, I did.

49th Interrogatory: If so, what price was he paid for it and who purchased it?

Answer: He was paid, I believe, eighteen hundred dollars—Is that right?—That's right.

And who purchased it? My daughter purchased it.

50th Interrogatory: Did you disclose to Mr. Connelly who it was that purchased this oil royalty from him?

Answer: No, I didn't.

Interrogatories on behalf of defendant T. Lamar Caudle:

1st Interrogatory: State whether or not during the years 1948, 1949, 1950 and 1951 you were counsel for

Irving Sachs in an income tax matter before the Bureau of Internal Revenue and the Tax Division of the Department of Justice in Washington.

Answer: Yes, I was.

2nd Interrogatory: During this period did you on occasions discuss this tax matter with the defendant, Theron Lamar Caudle; who was then the Assistant Attorney General of the United States, in charge of the Tax Division of the Department of Justice?

Answer: Yes, I did many times. Too many times; I cannot remember.

3rd Interrogatory: At all such times as you discussed this matter with Caudle was there someone else present? If so, who?

Answer: Well, Mr. Smith—I don't know who was the others, but——

The Witness: Tell me some others, will you, so I can remember.

4th Interrogatory: Did you on any occasion inquire of Caudle about investments?

Answer: Yes, I did.

5th Interrogatory: Did he give you any information in this respect?

Answer: Merritt-Chapman & Scott, and they had—I bought stock, 200 shares. Then they declared a dividend, about a hundred per cent dividend, or thereabouts.

6th Interrogatory: Did you act upon this information and if so in what manner?

Answer: I bought the stock.

7th Interrogatory: Did you have any conversations about investments you desired to make for Caudle? If so, what was said?

Answer: Well, he didn't advise me what to do. He said, "Nothing doing."

8th Interrogatory: Did you later make the purchase of an oil royalty in Caudle's name?

Answer: Yes, I did, and he didn't know what it was for.

9th Interrogatory: Did you tell, or otherwise inform, Caudle that you were negotiating the oil purchase in his behalf?

Answer: No, I didn't.

10th Interrogatory: During these oil negotiations did you write certain letters to one Chris Rhodes?

Answer: Yes, I did.

11th Interrogatory: Did you tell, or otherwise, inform, Caudle of these letters and did he authorize you in any manner to enter into these negotiations?

Answer: No, he didn't.

12th Interrogatory: The records show that you wrote a letter under date of August 4, 1950 to Caudle advising him that you had purchased an oil royalty in his name or in his behalf. Did you write such a letter?

Answer: Yes, I did.

13th Interrogatory: Had you told or otherwise informed Caudle of the transaction before writing your letter of August 4, 1950?

Answer: I don't know if I did, but I think I called him up and told him about the matter, long-distance.

14th Interrogatory: Did you tell or otherwise, inform Caudle of your dealings with Rhodes?

Answer: No, I never did.

15th Interrogatory: State whether or not on or about the 6th day of August, 1950 you telephoned Caudle from Kansas City at his residence in Washington regarding the purchase of an oil royalty.

Answer: Yes, I did. I think it was about that date.

16th Interrogatory: What was the conversation in the above mentioned telephone call?

Answer: Well—I told him about that oil royalty, and he said I shouldn't have done it. He also said he was angry with me for having done it.

17th Interrogatory: State whether or not this oil roy-

alty was transferred to you some time in April, 1951 or thereabouts.

Answer: Yes; I've still got it. I still have got it. It paid only—it paid around sixty dollars a month, and now it pays only seventeen dollars a month; and it paid that way every month from December—No, from—Well, it paid that way for all these months.

18th Interrogatory: State whether or not between August 6, 1950, or thereabouts——

The Witness: Wait a minute, what is the date?

State whether or not between August 6, 1950 or thereabouts and April 19, 1951 Candle telephoned you by long distance regarding the oil royalty in his name. If so, what was said?

Answer: Well, he didn't like it. He authorized me to get it back into my name. And I was sick and I just couldn't do it.

19th Interrogatory: State whether or not Candle talked to you in Miami, Florida and again at his residence in Washington, D. C. about the oil royalty in his name? And if so, when, and what was said?

Answer: Well, he told me to get it out of his name and back into mine, or somebody else he did not know; but he did not want to take it and keep it. That's what it was, he did not want to take it and keep it.

20th Interrogatory: Was there a delay in transferring the oil royalty out of Candle's name?

Answer: Yes, there was.

21st Interrogatory: If your answer to the last interrogatory is "yes", why?

The Witness: What is it you are saying?

(Interrogatory No. 21 repeated to the witness.)

The Witness: Repeat that question.

(Interrogatory No. 21 repeated to the witness.)

Answer: Well, he just didn't want to keep it. I was sick, and—I was sick, that was all.

22nd Interrogatory: Did Caudle receive any part of the proceeds of any of the dividend checks which were issued in his name?

Answer: No.

23rd Interrogatory: Did Caudle ever receive anything of value from you in connection with the Sachs case or in regard to any association which you may have had with him?

Answer: Nothing, nothing at all.

24th Interrogatory: State whether or not to your knowledge Caudle ever received any money or anything of value from Sachs or anyone else in connection with the Sachs case.

Answer: No, never, nothing at all.

25th Interrogatory: State whether or not you ever made any promise of reward either express or implied to Caudle as a consideration to him for a favorable ruling in the Sachs tax case.

Answer: No, nothing.

26th Interrogatory: Exhibit 100J shows the receipt by you of the sum of $10,000.00 from Sachs. Did Caudle receive any part of this money from you or from anyone else to your knowledge?

Answer: No, he never did.

27th Interrogatory: Exhibit 100J in this case shows that you were to hold $5,800.00 in escrow until the Sachs case was dropped. Did Caudle receive any part of this $5,800.00 from you or from anyone else to your knowledge?

Answer: No, he never did. No, he never did.

28th Interrogatory: Who received the $5,800.00 referred to in Exhibit 100J as being held by you in escrow?

Answer: I did.

29th Interrogatory: Did Caudle as far as you know have any knowledge of your financial arrangements with Sachs?

Answer: No, he never did.

30th Interrogatory: As far as you know, did Caudle

know of the entries that you made that appear in Exhibit 100J?

Answer: No, he never did.

Counter-Interrogatories on Behalf of Plaintiff The United States of America.

1st Interrogatory: Are you now willing to give any testimony you may have concerning anything material to the case against Matthew Connelly and T. Lamar Caudle, and to answer questions asked of you on behalf of the federal government?

Answer: Yes, I am.

2nd Interrogatory: Do you understand that although you are testifying as a witness today, any testimony you may give can be used against you?

Answer: I refer to the Fifth Amendment.

(Discussion off the record.)

The Witness: I want to proceed.

Mr. Imlay: He says he wants to proceed. And you are willing that he proceed?

Mr. Shenker: Yes.

Mr. Imlay: Regardless of any rights he may have under the Fifth Amendment?

Mr. Shenker: I haven't understood him to say that he doesn't want to proceed.

The Witness: No, I want to proceed.

3rd Interrogatory: Have you prior to the taking of these interrogatories read or had read to you, or been informed in any way as to any of the questions asked in this proceeding, or as to any of the answers you have given, are giving, or will give?

Answer: Yes, I have.

4th Interrogatory: If so state who furnished you with the questions, or who you discussed the questions and your answers with.

Answer: Well, Mr. Candle himself—that's Candle's brother—and Mr.——

The Witness: (To Mrs. Kantor) Write out that name.

Mrs. Kanter: Is that all right? Do you mean Mr. Adams?

Mr. Imlay: Let the record show that Mrs. Kanter suggested Mr. Adams' name.

Answer: (continuing) Yes, Adams, yes. And Mr. Nichols.

The Witness: (To the Notary Public) I don't know what you—I can't tell you what the spelling is. I can't read, or I can't spell or I can't write. But I can talk—a bit.

5th Interrogatory: When did you go to California in 1958, Mr. Schwimmer?

Answer: 1958, I went to California in December—in March—No; in—in July. And I came back in September 20.

6th Interrogatory: What was the address of the place you stayed?

Answer: Ambassador Hotel.

7th Interrogatory: Did you have the permission of a doctor to make the trip, and if so, what doctor or doctors and how long have they been attending you?

Answer: Oh, I had Dr. Wright's statement before I left, and he was attending me (since) in—1953.

8th Interrogatory: When and where did you first meet Irving Sachs?

Answer: Well, I went to Mr. Sheffrey's office. That's the first time I met him.

Mr. Sheffrey was an attorney in Kansas City.

9th Interrogatory: What was the occupation of Irving Sachs?

Answer: Well, he was a shoe manufacturer.

10th Interrogatory: Were you retained by Irving Sachs as an attorney, and, if so, when and in what type of case?

Answer: A tax case, from the very—No, it wasn't the very beginning, it was——

Well, a tax case.

11th Interrogatory: Had you ever handled a tax case before being employed by Irving Sachs?

Answer: No, I never was. That was the first time he got in trouble.

12th Interrogatory: What years were involved in the Sachs case?

Answer: 1948, and to 1952.

13th Interrogatory: Who is Louis Sachs?

Answer: I don't know, but I think he was his brother.

14th Interrogatory: Who is Benjamin L. Shifrin and what was your association with him?

Answer: Well, we both were associated together in the Sachs case.

15th Interrogatory: Who is Sidney Cohen and how, if ever, did you meet him?

Answer: I met him once. I think it was in St. Louis.

16th Interrogatory: Who is Frank W. Lohn and what was your association with him?

Answer: I don't know what—was I associated with that man? I don't know.

17th Interrogatory: Who is Frederick M. Seltzer and what was your association with him?

Answer: Well, he was Criminal Examiner for Kansas City.

(Interrogatory No. 17 repeated to the witness.)

Answer: (continuing) Well, he handled this case, from Kansas City.

18th Interrogatory: Who is Joseph M. Struett, and when did you meet him?

Answer: Well, he is from Chicago; and we went up there—Sheffrey and myself went up there, to meet him.

19th Interrogatory: Who is E. Riley Campbell and where and under what circumstances did you meet him?

Answer: Well, he was a Washington lawyer, and he was in Mr. Oliphant's office.

20th Interrogatory: Do you know Mr. Charles Oliphant?

Answer: Yes, I do.

21st Interrogatory: State where and under what circumstances you met him and what his occupation was at that time.

Answer: I met him in regard to a K. C. M. O. matter.

The Witness: That's spelled—I don't know how you spell it, but I think—Well, I don't know. K. C. M. O.

Answer (continuing) I used to represent that firm.

22nd Interrogatory: State where and under what circumstances you met Mr. George J. Schoeneman, and who introduced you to him.

Answer: I met him in Washington, and Mr. Connelly introduced me to him.

23rd Interrogatory: Do you know David L. Sheffrey, and if so, explain who he is and how you were associated with him.

Answer: Well, David Sheffrey was my co-counsel in the Irving Sachs matter.

24th Interrogatory: Directing your attention to December 27, 1947, do you remember a conference you had with Mr. Sheffrey and Mr. Shifrin concerning the Sachs case?

Answer: Mr. Sheffrey, Mr. Shifrin, and Irving Sachs and I were together, and discussing the Sachs case.

25th Interrogatory: If you do remember, state what its purpose was, what was discussed and where it was held.

Answer: Well, in Mr. Sheffrey's office, and—I don't know the—the litigants. Well, the litigants' proposals—that's all I can say.

26th Interrogatory: State whether or not you agreed with your co-counsel in the Sachs case when you were retained that you would bill the client when the work was finally concluded.

Answer: Yes, I was. I was—I would bill them for me, and they would bill them for the others.

27th Interrogatory: Did you receive $1,350 from Slu Stiles, Inc., by check dated January 2, 1948, Pl. Ex. 21 (a), five days after being retained in the Sachs case, and, if so, what was it for?

Answer: For a retainer, I do believe.

28th Interrogatory: Did you receive a letter dated February 17, 1948 from Mr. Shifrin in which he indicated that attorneys' fees were to be paid to you only when the Sachs case was "finally consummated"? Plaintiff Exhibit 8-I to be attached.

Answer: I didn't.

Mr. Shenker: The way I understood it, at least, was that the exhibit would be available and that the reporter would read the exhibit, rather than just ask that.

Is that your understanding or not?

Mr. Imlay: My understanding was that we would have them here in support of the particular question asked. If you want copies of these, affixed to it—I suppose I could have copies made.

Mr. Harris: Couldn't the witness see it before he answers it?

Mr. Shenker: Let the reporter read the exhibit, because the witness cannot read. It's very difficult. He couldn't read that type of stuff at all. The reporter ought to read the exhibit to him, and then the witness could answer in line with the question.

Mr. Imlay: That would involve reading unrelated matters here.

Mr. Shenker: That's what the purpose of it was.

Mr. Imlay: I'm not opposing the method of reading the letter. But at the same time, that will, of course, run into some time.

Mr. Shenker: Either show him the letter—But he says he can't read very well.

Mr. Imlay: He has testified that he can't read. And this letter, of course, is not under his hand so I thought——

The Witness: I do not remember ever receiving that letter. So go on to the next question.

Mr. Imlay: I am just trying to work something out here. Is everyone agreed that you want the exhibits read into the record?

Mr. Shenker: I think they should be—not necessarily read into the record, but the exhibit should be read to the witness, and the reporter should then show that he read the exhibit.

The purpose, as I understand it—when I was in court I didn't stay through the entire proceedings, but one of the objections that were raised by Mr. Rava was that they took excerpts of documents that go back over years; and your associate represented the Government at the time, and thought also, as I recall it, that it would only be fair that the document should be made a part of the interrogatories.

Mr. Imlay: These are all in evidence out there in the court for the Judge to look at in this proceeding. This would just involve—As a matter of fact, I tried to get something for Mr. Cole, you know, a copy made for Mr. Cole. But it's easier to——

Mr. Shenker: Let me see if I don't have a copy of the proceedings, what the Judge said.

Mr. Harris: I have got that here (handing to Mr. Shenker). I think certainly if the witness wants it read to him it ought to be read.

Mr. Imlay: The Clerk's memorandum of what was said didn't include that. But I will certainly permit that to be read. Some of them that are attached are not for his identification.

Mr. Shenker: It isn't a question of identification. It seems unfair to ask a witness if he received a letter on a certain date, or to pick out one sentence from a letter——

Mr. Imlay: Let me just hand you this, and then the reporter can read that letter.

Mr. Shenker: That's right. And I don't think that he has to put it in the record, but if the record shows that he reads it, then the record should show that he read it to the witness.

Mr. Imlay: And cite the exhibit, so the record will refer to it.

Mr. Shenker: That's correct, in connection with that question, that's correct.

(The Notary Public read Plaintiff's Exhibit 8 (i), a photostatic copy of a letter on the letterhead of Shifrin & Shifrin, attorneys and counselors at law, 811 Olive Street, St. Louis, Missouri, dated February 17, 1948, to Harry I. Schwimmer, David L. Sheffrey, from Ben L. Shifrin.)

Answer: (continuing) Yes, I received that letter. And then it was agreed upon to go beyond that letter. That was the very essence of it.

29th Interrogatory: If so, had you, or anyone to your knowledge informed Mr. Shifrin of the $1,350 already paid you?

Answer: Well, I can't remember that. But that had to be in my files.

30th Interrogatory: You have already been shown a letter, Plaintiff's Exhibit 102, in the first paragraph of which you say:

Dear Matt: Tom informed me of your kindness in offering to help me, which I sincerely appreciate.

Who is the Matt referred to?

Answer: Matt Connelly.

31st Interrogatory: The evidence shows that you were retained in the Sachs case on December 27, 1947 and that you sent this letter referring to an offer from "Matt" on January 5, 1948. Is that your understanding of what transpired?

Answer: Yes, it was.

32nd Interrogatory: To what were you referring when you said "offering to help me"?

Answer: The helium matter.

33rd Interrogatory: In the last paragraph of the same letter (Plaintiff's Exhibit 102) you say "I hope now to leave Kansas City about the 17th of this month, and if I may, I will call or wire you as to the date that I will be in Washington". Why were you coming to Washington?

Answer: I don't know.

34th Interrogatory: Did you come to Washington on or about the 17th of January, 1948?

Answer: I don't know.

35th Interrogatory: What did you do in Washington on that occasion?

Answer: Well, I don't know. I simply don't know what I did or what I didn't do.

36th Interrogatory: Did you see Mr. Oliphant on that occasion, and if so, what did he tell you?

Answer: Well, he may have seen me or he may have not, I don't know.

37th Interrogatory: Who, if anyone arranged your meeting with Mr. Oliphant, and who introduced you to him?

Answer: I think it was Matt Connelly, but I don't know who it was.

38th Interrogatory: Did you call Mr. Oliphant on the telephone on January 22, 1948 while in Washington to inquire about the Sachs case?

Answer: Yes, and no. I could not answer that in a— I don't know.

39th Interrogatory: If you did call Mr. Oliphant, what did he tell you on that occasion?

Answer: Well, we had a hearing on that occasion or some other occasion.

40th Interrogatory: On this trip to Washington did you meet with the Commissioner of Internal Revenue, George J. Schoeneman?

Answer: Well, about that time. And—Wait a minute—The Commissioner of Internal Revenue called Mr. Oliphant that time.

41st Interrogatory: If you did, who arranged for you to see him?

Answer: I think—and I may be mistaken—but I think it was the Commissioner of Internal Revenue.

(Interrogatories No. 40 and 41 were repeated to the witness.)

The Witness: The Commissioner of Internal Revenue.

42nd Interrogatory: Did you have an appointment on another occasion to see Mr. Schoeneman, and, if so, who arranged for that visit?

Answer: Mr. Schoeneman—no, no, I never have. One appointment with him.

(Whereupon, at 3:55 P. M., on the advice of Dr. Palmer, the propounding of the interrogatories was adjourned until Tuesday, September 30, 1958, at 2:00 P. M. at the same place. The following colloquy among counsel took place:)

Mr. Shenker: I should like—prior to the opportunity for anyone to discuss this matter with Mr. Schwimmer, and in the presence of all the parties here, and with no private conferences or conversations or discussions with Mr. Schwimmer—I should like to ask Mr. Schwimmer to follow me.

Mr. Schwimmer, in answer to the plaintiff's Interrogatory No. 3, which interrogatory is as follows:

"Have you prior to the taking of these interrogatories read or had read to you, or been informed in any way as to any of the questions asked in this proceeding, or as to any of the answers you have given, are giving, or will give?" Your answer was, "Yes, I have."

And then, to plaintiff's Interrogatory No. 4—"If so, state who furnished you with the questions, who you discussed

the questions and your answers with"—your answer was, "Caudle's brother, and Mr."—and then you hesitated about the name and the name of "Adams" was supplied to you.

The Witness: Yes.

Mr. Shenker: And then, as I recall, I believe you also mentioned a Mr. Nichols.

Now, in connection with those I should like to ask you—and also, you said that Mr. Caudle, I think, himself—I will ask you, sir: When did you last talk to Mr. Caudle?

The Witness: I talked to him on May 7th—May, 1958.

Mr. Shenker: All right. Now, when did you last talk to Mr. Adams?

The Witness: That was the same date.

Mr. Shenker: The same date. And when did you last talk to Mr. Caudle's brother?

The Witness: The same date.

Mr. Shenker: That's all in May of 1958?

The Witness: Yes.

Mr. Shenker: And when did you last talk to Mr. Nichols?

The Witness: In May of the same year.

Mr. Shenker: Also in May of 1958?

The Witness: Yes.

Mr. Shenker: Is that the last time that you discussed anything with any of those gentlemen pertaining to the testimony that you are to give?

The Witness: Yes, it was.

Mr. Shenker: Now, I will ask you to state if anyone has shown you any of the interrogatories prior to today—the exact questions or the interrogatories which you are answering today.

The Witness: Nobody.

Mr. Shenker: Has anyone read to you any of those interrogatories?

The Witness: Nobody.

Mr. Shenker: And has anyone discussed with you any specific questions in any of the interrogatories, whether Government interrogatories, Mr. Connelly's interrogatories or Mr. Caudle's interrogatories?

The Witness: No, not at all.

Mr. Shenker: Not at all. Then your answer that you gave at the beginning of these interrogatories pertains to discussions that you had when your original affidavit was taken; is that correct?

The Witness: Yes.

Mr. Shenker: Which was way back in May of 1958?

The Witness: Yes.

Mr. Shenker: I just wanted to clear that up, and the record ought to show it now before we adjourn.

Mr. Imlay: I want to say just one thing. I want to make sure no attempt is made to rehabilitate the witness or to reconstruct any of the answers given on rereading.

Mr. Shenker: No one has the answers.

Mr. Imlay: I'm talking about when the questions and answers are made up.

Mr. Shenker: I'm sorry, I didn't understand you. My understanding is that the reporter does not release these interrogatories with the answers until he reads them to Mr. Schwimmer, and then he takes down any suggestion he has, if any, and then has him sign before filing it in court. That's my understanding.

Wasn't that your understanding of the ground rules, that the answers, when they are made and when they are finally concluded—the reporter doesn't give them to any of the parties, but sends them to the court?

Mr. Imlay: That's right, right directly to the Court.

Mr. Shenker: That was my understanding.

(Whereupon at 4:05 P. M. the proceedings were adjourned until Tuesday, September 30, 1958, at 2:00 P. M. at the same place.)

Tuesday, September 30, 1958.

2:05 P. M.

HARRY I. SCHWIMMER,

having been previously duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth in answer to the interrogatories and counter-interrogatories, as hereinafter indicated, further deposes and says as follows:

Counter-Interrogatories on Behalf of Plaintiff, The United States of America (Continued):

43rd Interrogatory: Did you write a letter on January 28, 1948, on your return from Washington and say to Mr. Connelly: I want to thank you, Matt, for the privilege of being with you and the courtesies extended. * * * Plaintiff's Exhibit 111 to be attached.

Mr. Shenker: Would you read that letter to him, please?

(Plaintiff's Exhibit 111 was read by the Notary Public to the witness.)

Answer: I don't know if I wrote it, but I assume that I did.

44th Interrogatory: Is it not a fact that you were retained in the Sachs case in the last week in December, 1947?

Answer: Yes.

45th Interrogatory: Were you promised help by Connelly in the Sachs case shortly thereafter?

Answer: No, I was not.

46th Interrogatory: Did you leave for Washington within a few days after being retained in the Sachs case?

Answer: I don't know.

47th Interrogatory: Did Connelly introduce you to high officers in the Internal Revenue Service on that trip?

Answer: The only thing that he introduced me to is Schoeneman.

48th Interrogatory: In view of the evidence that you were in Washington on that occasion in connection with the Sachs case, is it now your position that you were there in connection with some business other than the Sachs case?

Answer: Yes, I was.

49th Interrogatory: When you were retained in the Sachs case, did you tell the co-counsel of your connection with high officials in Washington?

Answer: No.

50th Interrogatory: Documentary evidence in this case (Pl. Ex. 54 (f)) shows that on September 9, 1948 you called Mr. Oliphant saying "Matt thought it would be a good idea to see if there is anything new in regard to Shu-Stiles" and that Mr. Oliphant agreed to see and contact you later. Do you remember calling Mr. Oliphant on that occasion?

Answer: I suppose I did, but I'm not sure.

51st Interrogatory: Do you remember that you told him that?

Answer: I am—well, I'm not sure that I told him that, but it's probable that I did.

52nd Interrogatory: Do you remember that you talked with Connelly about the Shu-Stiles case shortly prior to that call?

Answer: I know I did not.

53rd Interrogatory: What were the issues involved in the Sachs-Shu-Stiles case when it was before the Internal Revenue Service?

Answer: Well, it was—I don't know what it was, but it was not health. That was about the Internal Revenue Department.

54th Interrogatory: The evidence shows that during the period the tax case was in the Internal Revenue Service you received numerous checks in large amounts from Shu

Stiles, Inc. What were these checks for and what was done with the proceeds?

Answer: Well, all of it was supposed to go to me, and it was supposed to go to me; and I never knew that Connelly or Caudle ever received a penny from these checks.

55th Interrogatory: Did you on January 25, 1949 call Mr. Oliphant on the telephone and make an appointment to see him that same day?

Answer: Yes—I don't know, but I suppose so.

56th Interrogatory: Do you remember the purpose of this visit and who was present?

Answer: Well, I don't know what was the purpose of the visit.

57th Interrogatory: Do you remember that on June 17, 1949 you wrote Mr. Oliphant about the Sachs case and expressed the hope that "a proper settlement may be effected" of the case? Plaintiff's Exhibit 5 DDD to be attached.

(Plaintiff's Exhibit 5 (DDD) was read by the Notary Public to the witness. Interrogatory No. 57 was repeated to the witness.)

Answer: Yes, I did—I assume I did.

58th Interrogatory: If you so remember, what did you mean by the phrase "a proper settlement may be effected"?

Answer: I meant a cash settlement.

59th Interrogatory: When and where and under what circumstances did you first meet Mr. Caudle, and what was his occupation then?

Answer: I met him in September or October, 1949, and that was—he was a tax consultant, a head of the Tax Department, of the Government service.

60th Interrogatory: When and where and under what circumstances did you first meet Mr. Connelly, and what was his occupation?

Answer: Secretary to Senator Truman.

61st Interrogatory: Do you remember that in August, 1949 a Mr. Skeer was taking care of your business during your absence in Coronado, California?

Answer: Yes, he was.

(Mrs. Kanter entered the room at this point.)

62nd Interrogatory: Do you remember that he called you long distance and told you the Sachs case was being transferred to the Department of Justice?

Answer: Yes, he called me.

63rd Interrogatory: Did you tell him that you were going to call Mr. Connelly about this?

Answer: Yes, I did.

64th Interrogatory: Did you in fact call Mr. Connelly about that?

Answer: Yes, I did.

65th Interrogatory: Did you call anyone else in Washington about the transfer of the Sachs case to the Department of Justice?

Answer: I don't know whether I did or didn't.

66th Interrogatory: State in substance if you can what you told the grand jury on November 15, 1955 was the purpose of the $10,000 check made out to you.

The Witness: Read me the date of that.

(Interrogatory No. 66 was repeated to the witness:)

Answer: I told them that—I presume that I told them that five thousand eight hundred dollars was going to me, and seven—no—four thousand two hundred dollars was going to Matt Connelly. But I don't know that I told them that, in the first place.

Mr. Cole: Excuse me, may I have that response as you've got it, please?

(Witness' response to Interrogatory No. 66 was read by the Notary as recorded.)

67th Interrogatory: Did you or did you not tell that grand jury that the $10,000 check to you was a retainer check?

Answer: Yes, I did, but I did not remember that.

68th Interrogatory: If your answer to the previous question is "No", state how you described this check to that grand jury.

Answer: Well, I said a certain amount was going to me and a certain amount was going to Matt Connelly, but he never knew about it.

69th Interrogatory: State whether you misinformed the grand jury concerning the payment to you of the $10,000 check, and, if so, what was it?

Answer: I don't remember.

70th Interrogatory: State the person or persons who gave you your instructions concerning the way the $10,000 was to be distributed, and in what manner such instructions were communicated to you.

Answer: Nobody at all.

71st Interrogatory: Was the $10,000 check deposited in your personal account or in a trustees account, and in what bank?

Answer: Well, I don't know precisely what bank, but I think it was the Columbia National Bank.

72nd Interrogatory: State whether your co-counsel in the defense of Irving Sachs were informed by you or anyone else to your knowledge of the receipt by you of the $10,000 check, and, if so, what were they informed was its purpose?

Answer: I don't know whether they knew or did not know.

73rd Interrogatory: State what your fee arrangement was with your other co-counsel.

Answer: I had the fee coming to me, and they had their fee according to their work.

74th Interrogatory: Was this agreement in writing?

Answer: I don't know.

75th Interrogatory: Was any part of the $10,000 eventually retained by you as attorneys fees, and if so, how much?

Answer: I don't know exactly, but thirty-five—thirty-six hundred—No, wait a minute—thirty-four hundred—

Mrs. Kanter: Sixty-four——

Mr. Imlay: Don't talk to him, Mrs. Kanter.

The Witness: Why shouldn't she talk to me?

Mrs. Kanter: You can put it in the record, can't you?

Mr. Shenker: I think he should answer, and if he doesn't know, even if it's a matter of adding, I don't think anyone should interfere. Just let him do the best he can, realizing his condition. Just let him do the best he can. If he can't figure it out, he can't figure it out.

Answer: (continuing) Sixty-five hundred and forty-four thousand dollars was retained by me, and thirty-six hundred was for the royalty. Thirty-six hundred and some-odd dollars.

76th Interrogatory: If you did retain part of the $10,000 for your own use, was this with the agreement and knowledge of your other co-counsel?

Answer: No.

77th Interrogatory: By what method and when did you so inform the other co-counsel that you were paying over to yourself such sum of money?

Answer: They weren't supposed to know.

78th Interrogatory: When you were before the grand jury on November 15, 1955, was the following question asked you and did you give the following answer:

"Q. Is it your statement that you regarded this money as some sort of an advance?

"A. It was an advance on my fee. It is what you call a retainer fee. It is for work to be done or maybe, as I said before, work I had already done."?

Answer: Yes, I did.

(At this point the witness requested a short recess. A recess of approximately five minutes was taken.)

79th Interrogatory: If you did not so testify, to what did you testify?

Answer: I don't know.

80th Interrogatory: State whether or not you explained to the grand jury that part of this $10,000 was intended or actually used to buy an oil royalty for Matthew Connelly.

Answer: I don't know if I did or I didn't.

81st Interrogatory: State whether or not your memory as to what the purpose of the $10,000 was, is as good now or better than it was on November 15, 1955.

Answer: Well, you'd better—I can't say that I'm better now than I was then, because I could read and write and have the faculty of my memory then, when I don't have it now.

82nd Interrogatory: Did you tell the grand jury that part of the $10,000 was to be kept in one of your accounts and held in escrow?

Answer: I don't know.

83rd Interrogatory: Your sworn statement given on behalf of Mr. Connelly on June 3, 1958, at page 20, indicates that the $10,000 was received by you from the Shu-Stiles Company "on account of Mr. Sachs". Is this statement correct?

Answer: I presume that it is.

84th Interrogatory: Is this statement the same that you told the grand jury?

Answer: I don't know if it did or it didn't.

85th Interrogatory: You have already testified concerning Exhibit 100-J. Is this one page of a journal kept by you in your handwriting and containing entries running from January 1948 to December 1950?

Answer: I believe it is.

Mr. Harris: I'd like the record to show that he wasn't shown 100-J at this time.

Mr. Shenker: That's right.

Mr Imlay: Exhibit 100-J, of course, was shown him by the——

Mr. Harris: Was shown him yesterday.

Mr. Imlay: It was shown him yesterday.

Oh, here it is.

(Photostatic copy of Exhibit 100-J handed to the witness.)

86th Interrogatory: I show you a copy of Exhibit 100-J. Can you read this exhibit previously shown you by the defense counsel?

Answer: I cannot read the exhibit at all.

87th Interrogatory: Do you distinctly remember making this entry?

Answer: Yes, I do, because I got the figures down here. But I don't know what the writing is.

88th Interrogatory: Do the pages of the journal of which this is a page reflect your various financial transactions with Shu-Stiles, Inc., and Irving Sachs including various reimbursements for out-of-pocket expenses during the period January, 1948, to December, 1950?

Answer: I don't know whether it does or does not.

89th Interrogatory: What was the purpose of entering the various entries relating to reimbursements of traveling and other expenses by Shu-Stiles, Inc., and "loans" in this journal?

Answer: I don't know what it was, whether it was expenses or what.

90th Interrogatory: You have stated that this book was kept for tax purposes.

The Witness: Yes.

90th Interrogatory (continuing): How would the recording of such items relate to tax information?

Answer: Well, I knew that I recorded it that way.

91st Interrogatory: Did you keep this book to show to tax authorities if your returns were challenged?

Answer: Yes.

92nd Interrogatory: It is your contention that you kept

erroneous information for October, 1949, in this journal for tax purposes?

Answer: No, I did not.

93rd Interrogatory: An entry in this journal dated September, 1949, on a page admitted into evidence as Exhibit 100 (G) reflects as an "advance or loan" from "Shu Stiles", an item of $2400. State how this fund of money was dispensed and for what purpose.

Answer: I don't know.

94th Interrogatory: Were your co-counsel in the Sachs case informed that this item of $2400 was turned over to you, if in fact it was?

Answer: No, they weren't advised.

95th Interrogatory: Did you declare this item or any part thereof on your income tax returns, and if so, when?

Answer: I don't know.

96th Interrogatory: One line of this Exhibit 100-J indicates a $2,500 "loan" from I. Sachs. Was this amount loaned to you, and if so, by whom and what did you do with this money?

Answer: I don't know what I did with it.

97th Interrogatory: Did you inform your co-counsel in the Sachs case that this amount was loaned to you?

Answer: No, I did not.

98th Interrogatory: In respect to the line "Pd out Oil Royalty M. C. 4,200", it has been conceded that "M. C." refers to Matthew Connelly, and that $3,600 for an oil royalty was taken from this account. Why did you indicate the sum of $4,200 here as the sum used for oil royalty?

Answer: I don't know why I did that.

99th Interrogatory: Is it a fact that the sum of $4,200 was the amount you predicted that an oil royalty for Connelly would cost prior to agreeing on its actual price with Chris Rhodes?

Answer: I don't know what I agreed with Chris Rhodes, but I certainly never agreed to pay more than that.

100th Interrogatory: Is it your position that you entered this figure of $4,200 here because you wanted a record for tax purposes?

Answer: No.

101st Interrogatory: If that was not your purpose, state why you recorded this amount of $4,200 here.

Answer: I don't know, except—I don't know.

102nd Interrogatory: When asked by Mr. Connelly's attorney in your previous sworn statement when this entry was made, you could not definitely say. Can you definitely state now when it was made, and if so, state when it was made.

Answer: No, I don't think I can. But I do remember—I don't know what I made the entry for.

103rd Interrogatory: Would an entry in a journal covering the period of a month normally be made at the beginning of the next month?

A. No.

104th Interrogatory: Exhibit 100-J indicates the date October, 1949. Would you normally have made this entry when all the business of the previous month was concluded, in this instance, about the first week in November, 1949?

Answer: No, I do not know.

105th Interrogatory: In respect to the sum of $5,800, the Exhibit 100-J indicates that it was to be held "in escrow" to be paid out depending on whether I. Sachs is dropped. What is your understanding of the meaning of the term "escrow?"

Answer: "Escrow" means the money would go to me.

106th Interrogatory: Was the $5,800 actually retained in your own bank account? If so, where and to whom was it "to be paid out", if it was already in your account?

Answer: I don't know.

107th Interrogatory: In a sworn statement you gave to the attorney for Mr. Connelly on June 3, 1958, you indicated that you discussed the subject of an oil investment

with Mr. Connelly and Tom Evans at the Muhlbach Hotel in Kansas City.

The Witness: Yes, that is correct.

107th Interrogatory (continuing): When was that discussion and what was said and agreed on, if anything, there?

Answer: Matt Connelly didn't have the money, so Mr. Evans said that he would loan him the money. And that was for seven hundred dollars.

108th Interrogatory: Did you have any other conversations with Mr. Connelly regarding the purchase of an oil royalty for him, and if so, where and when?

Answer: I don't know.

109th Interrogatory: In your sworn statement recently given to the attorneys for Mr. Connelly on June 3, 1958, you indicated that Tom Evans knew what this royalty actually cost. How and when did he learn of its actual cost, and state in what way you ascertained this fact?

Answer: I told it to him privately.

110th Interrogatory: Did you make a trip with Mr. Tom Evans during the latter part of 1949, and if so, by what method of transportation and where did you go?

Answer: I do not know.

111th Interrogatory: Did you discuss the purchase of an oil royalty for Connelly with Tom Evans on this trip?

Answer: No. I don't remember ever taking a trip with Tom Evans.

112th Interrogatory: Did you tell Tom Evans that you would like to do something for Matt Connelly because he has been so very nice to you?

Answer: No, that was very, very wrong.

113th Interrogatory: Mr. Evans has testified that you told him, "Why couldn't I buy him an oil royalty that would cost seven or eight hundred dollars that would produce for him thirty, forty, or fifty dollars a month?" Do you remember saying this, and if so, where and when?

Answer: I never said that.

114th Interrogatory: Did you tell Evans that you guaranteed that Connelly would not lose money or words to that effect?

Answer: Oh, I may have said that to him, but I don't remember where it was.

115th Interrogatory: Do you remember that Evans later talked with Connelly and offered to lend him the sum of $750, and then telephoned you to that effect?

Answer: No.

116th Interrogatory: Did Tom Evans lend Connelly $750?

Answer: Yes, he did.

117th Interrogatory: Did Connelly send you the sum of $750?

Answer: Yes, he did.

The Witness: I said seven hundred dollars, but it was seven hundred fifty dollars.

118th Interrogatory: If so, did he send this sum in the form of a cashier's check made out to you?

Answer: I don't remember who it was made out to, but I suppose that it was a cashier's check made out to me.

119th Interrogatory: Did you later send Mr. Evans a check for $750 to cover his loan to Connelly?

Answer: Yes, I did.

120th Interrogatory: When did you buy the oil royalty for Mr. Connelly?

Answer: In December of 1949, and then I sent it to him about January or February, 1950.

121st Interrogatory: How much did you pay for it?

Answer: Here is the amount I paid for it.

(Witness made calculation on sheet of paper and indicated last amount on sheet to the Notary Public.)

Mr. Cole: I'd like that paper made a part of the record.

Mr. Shenker: I think we can all agree that the last figure shows "3600," is that correct?

Mr. Cole: But keep that page and make that page a part of the record.

(Sheet of paper used by the witness in making calculation attached hereto as Appendix D.

U. S. A. counter-interrogatory 121.)

122nd Interrogatory: Do you remember that on October 26, 1949, Mr. Connelly called Mr. Caudle to say that you were in town, and to ask whether you could come over to the Department of Justice?

Answer: I don't know, but I presume that he said this.

123rd Interrogatory: Were you with Mr. Connelly when this call was made?

Answer: I don't know—or I don't remember.

124th Interrogatory: Did you personally see Mr. Connelly at the White House on this occasion?

Answer: I saw him on that occasion, that's all.

125th Interrogatory: Did you discuss the purchase of an oil royalty for Mr. Connelly with anyone on this trip to Washington?

The Witness: What was that trip?

Mr. Harris: I think you ought to go back to 122.

(Interrogatory No. 122 repeated to the witness. Interrogatory No. 125 repeated to the witness.)

The Witness: Wait a minute, state more specifically—I can't read it—or I can't visualize it.

(Interrogatories Nos. 122 and 125 repeated to the witness.)

Answer: I didn't talk to Mr. Connelly about an oil royalty.

126th Interrogatory: The evidence shows that you were in Washington for the meeting with Caudle arranged by Connelly two weeks after Sachs made out the check in your favor for $10,000 on October 12, 1949. Did you dis-

cuss the oil royalty purchase with Mr. Connelly on this occasion?

Answer: No, I didn't.

127th Interrogatory: The entry on the Exhibit 100-J has at the top the date line "Oct-49". Did you make this entry on the Exhibit 100-J after your conversation in Washington with Connelly, referred to in interrogatory No. 125?

Answer: Yes—No, I don't know when I made the date on this.

Mr. Shenker: Let the record show that when he said "this" he was referring to Exhibit 100-J, which was lying there and which he touched and referred to.

128th Interrogatory: Can you distinctly remember whether you did or not?

Answer: No, I can't.

129th Interrogatory: Did you see Mr. Caudle on October 26, 1949, on that trip to Washington?

Answer: I presume it was that date. But he sent me back home and told me to recuperate.

130th Interrogatory: Do you remember that you talked alone with Caudle prior to being joined by Turner Smith who was called into a conference at the Department of Justice?

Answer: No, I do not remember.

131st Interrogatory: Did you on that day first suggest that Sachs was in bad health?

Answer: He was in bad health prior to I knew him.

132nd Interrogatory: When did you first know that Sachs was in bad health?

Answer: From the minute that I saw him, we discussed it.

133rd Interrogatory: What was the nature of his illness?

Answer: I don't remember what the nature of his illness was, but——

134th Interrogatory: The evidence shows that Connelly was paid 25 checks on his oil royalty. Were these sent direct to your office, and if so, why?

Answer: Well, I sent them to my office, and I sent them to him direct.

135th Interrogatory: How did you handle these checks after receiving them?

Answer: I sent them to him.

136th Interrogatory: Whose idea was it that they be handled in this way?

Answer: My idea, my idea.

137th Interrogatory: Did you send them to Mr. Connelly's private residence in Washington, and if so, whose idea was it that this procedure be followed?

Answer: I presume that I did. It was my idea.

138th Interrogatory: Was this method of sending checks through you to Connelly devised so that the transactions would be more difficult to trace?

Answer: No.

139th Interrogatory: Did you ever discuss the Sachs tax case with Mr. Caudle in private at any time and if so, when?

Answer: Never before in private; always with someone else there.

140th Interrogatory: Did you confer with Mr. Caudle about the case in long distance telephone conversations?

Answer: Yes.

141st Interrogatory: Did you go to Mr. Caudle's home at any time while working on the Sachs tax case?

Answer: Yes, I did.

142nd Interrogatory: Did you confer with Caudle in Florida at any time, and if so, when?

Answer: I think it was in 1952, and he was telling me to get this thing out of his name.

143rd Interrogatory: Did you endorse Caudle's own name or any of his eight oil royalty checks, and if so, when?

(Discussion off the record.)

Mr. Shenker: Let the record show that the word "or" may be changed to "on."

(143rd Interrogatory: Did you endorse Caudle's own name on any of his eight oil royalty checks, and if so, when?)

Answer: I don't know, but I presume that I did.

144th Interrogatory: If you did not, state if you know who did.

Answer: Well, my secretary may have endorsed it.

145th Interrogatory: Did you retain any of the money from any such checks?

Answer: Yes, I did.

146th Interrogatory: If your answer is in the affirmative, state whether you declared such amounts as income on your tax returns, and if so, when.

Answer: I don't know.

147th Interrogatory: If all of the money from the Caudle oil checks were not paid to you, describe to whom it was paid.

Answer: Just to me.

148th Interrogatory: The evidence shows that one of Caudle's oil royalty checks was endorsed only by him (Pl. Ex. 89 (d)). State what was done with the proceeds of this check, if you know. Exhibit to be attached.

Answer: Well, he turned the money over to me.

149th Interrogatory: Were the proceeds of these checks placed in your own or a trustee's or attorney's account in the Columbia National Bank in Kansas City?

Answer: I don't know about that.

150th Interrogatory: The evidence shows that the first three of Caudle's oil royalty checks were endorsed first by him, and then by you. Then you bought a cashier's check in the amount of these three checks which you kept for a year, and which you then negotiated in Puerto Rico. Do you admit that this was the true facts?

Answer: Yes.

151st Interrogatory: If not, state what the true facts are as to the way you handled these three checks.

Answer: They—The previous answer answers it.

152nd Interrogatory: If you admit that you did this, state why you did it.

Answer: I don't know why I did it, but I had reason to do it, but I don't know why.

153rd Interrogatory: Did you ever have occasion, to discuss other oil investments with Mr. Caudle?

Answer: Yes, I did.

154th Interrogatory: Did you have any other transactions with him regarding oil investments?

Answer: Yes, I did.

155th Interrogatory: If so, state what they were.

Answer: Well, he never was interested in these oil royalties, but gave me the name of two oil men that I interviewed, but he was not—he had nothing to do with those royalties.

156th Interrogatory: Do you remember calling both Mr. Caudle and Connelly on March 7, 1950?

The Witness: What date is that?

(Interrogatory No. 156 repeated to the witness.)

Answer: I don't remember whether I did or didn't.

157th Interrogatory: Do you remember then having a conference with Caudle on March 10, 1950?

Answer: I don't—I don't presume so, but I guess I did.

158th Interrogatory: Do you remember that you made another call to Caudle from Kansas City on April 23, 1950 (Pl. Exs. 66, 73)? Exhibit to be attached.

(At this point the witness asked for a brief recess. A recess of approximately five minutes was taken.)

The Witness: I cannot go—Just for a little while. I cannot go on for a little while.

(A recess of approximately five minutes was taken.)

The Witness: I'm ready now.

Mr. Harris: (To the Notary Public) Re-read the question.

158th Interrogatory (repeated): Do you remember that you made another call to Caudle from Kansas City on April 23, 1950 (Pl. Exs. 66, 73)? Exhibit to be attached.

Answer: I don't know for sure, but I assume I did.

159th Interrogatory: Did you, on April 26, 1950, confer with a Dr. Tureen, and tell him what medical information you needed concerning Mr. Sachs?

Answer: No; he told me what I needed, that Dr. Tureen.

160th Interrogatory: If so, did you later that day go to a hotel with Mr. Shifrin and Mr. Sheffrey and prepare interrogatories in question and answer form and send them to Dr. Tureen for his signature?

Answer: After he told me what Sachs was suffering from, he—Mr. Sheffrey and I went to a hotel room and copied out the names of the disease and many other things.

161st Interrogatory: Did you then send these interrogatories directly to Caudle?

Answer: Yes, I did.

162nd Interrogatory: Did you make an arrangement with Caudle prior to preparing the interrogatories that they be sent to him?

Answer: I don't remember now what I did.

163rd Interrogatory: Do you remember a letter written by Caudle on May 3, 1950 saying that he had read the interrogatories and that they had personally impressed him very much?

Answer: Yes, I know that he did, but I don't remember the date.

164th Interrogatory: Do you remember that prior to the time you received Caudle's letter of May 3, 1950, you called him by telephone and asked that he read the interrogatories of Dr. Tureen in full?

Answer: Yes, I suppose I did.

165th Interrogatory: Could you have made such a request of Caudle in a call on April 23, 1950 before the interrogatories of Dr. Tureen were actually taken?

Answer: No, I don't think so.

166th Interrogatory: Plaintiff's Exhibit 76 (L) indicates that you wrote Chris Rhodes on July 13, 1950, in regards to the oil royalty stating you thought you would be willing to pay $3,300 but

> "I have to wait to get this information to the person interested, which should take a couple of days, then you will hear from me."

This letter adds, "However, I am pretty confident we will take it." Do you remember this letter? Exhibit to be attached.

Answer: Well, I don't admit that I sent the letter, but I was pretty close to that.

167th Interrogatory: Who was the other person you refer to?

Answer: I don't know.

168th Interrogatory: The evidence indicates that 3 days prior to this on July 10, 1950, Caudle called you and talked for nine minutes [Plaintiff's Exhibit 137 (a)]. If you remember this to be a fact, state whether you discussed the oil royalty that you were then negotiating for him, and what was the substance of the conversation.

Exhibit to be attached.

Answer: No, it wasn't the oil royalty, but I don't remember what matter it was.

169th Interrogatory: Mr. Caudle testified that you discussed investments with him in his office at the Department of Justice prior to July 15, 1950. The evidence shows that on July 15, 1950, you wrote to Rhodes,

> "I just received word to go ahead on the purchase of the oil royalty."

You also stated that you would send your check for $3,300 Monday, that "the royalty should be purchased in the name of T. L. Caudle, 2939 Newark, N. W., Washington, D. C." and that you were leaving Tuesday morning for Washington. [Plaintiff's Exhibit 76 (M)]. State whether you wrote this letter.

Exhibit to be attached.

Answer: I don't remember whether I did or whether I didn't.

170th Interrogatory: Was it the result of a conversation with Caudle in Washington prior to July 15, 1950?

Answer: I don't remember.

171st Interrogatory: Also there is in evidence one check dated July 15, 1950, made out to you by Shu-Stiles, Inc., in the amount of $3,600, negotiated on July 17, 1950 [Plaintiff's Exhibit 21 (S), 158], together with another for $742 from Shu-Stiles [Plaintiff's Exhibit 21 (R)]. State what you did with this money.

Exhibits to be attached.

Answer: I don't know what I did with the money. I presume I deposited it in the bank.

172nd Interrogatory: Did you make out a check to Chris Rhodes on July 17, 1950, in the amount of $3,300?

Answer: Yes, I did. I presume I did.

173rd Interrogatory: There is an entry in your journal admitted in evidence as Plaintiff's Exhibit 100(P) which carries a $3,600 item as "Reimbursement of Money Advanced Shu-Stiles." Does this relate to the purchase of Caudle's oil royalty, and if not, explain what it means.

Answer: It had nothing—It had nothing to do with Caudle's oil royalty at all. But I don't know what it means.

174th Interrogatory: Was $3,600 the original price offered for the oil royalty by Chris Rhodes on June 27, 1950?

The Witness: What was the amount, please?

(Interrogatory 174 was repeated to the witness.)

Answer: I don't know what it was.

175th Interrogatory: State whether on August 4, 1950, you wrote a letter to Mr. Caudle at his home enclosing a transfer order for the oil royalty for Mr. Caudle's signature.

Answer: I don't know, but it's a fact that I did enclose the oil royalty.

176th Interrogatory: Mr. Caudle testified that a little before August 5, 1950, you called him from Kansas City and told him you had bought two oil royalties, one for him for $750 and one for yourself for $750. Is this a true statement of what happened?

Answer: Yes, it is, but I don't know what date it was.

177th Interrogatory: Did you in September 1950 have a conversation with Mr. Caudle wherein he stated that he had not received a check on September 15, 1950 for his oil royalty?

Answer: No, I didn't.

178th Interrogatory: There is a letter admitted in evidence, dated September 18, 1950 in which you told Rhodes that although you had received the deed on the property you purchased in Caudle's name, you did not receive the September 15th check. In this letter you asked him to check with the Sinclair Oil and Gas Company, because, as you state in the letter, "Mr. Caudle has already asked me about it" (Plaintiff's Exhibit 76(s)). Do you remember writing this letter?

Exhibit to be attached.

Answer: Yes, I do—did something like that.

179th Interrogatory: Do you deny writing this letter?

Answer: No, I did not. But it was this letter, but Caudle had nothing to do with it.

180th Interrogatory: If you wrote the letter, did you tell Rhodes the truth when you said that Caudle had already asked about the September 15th oil royalty check?

Answer: No, it——

Well, what shall I answer, yes or no? I said Caudle had nothing to do with that royalty.

181st Interrogatory: Did you write another letter on October 12, 1950, telling Rhodes that you still had not received the September 15th check and did you make the following statement:

"I hate like the devil to bother you, but I am sort of in a spot."

(Plaintiff's Exhibit 76-U). Exhibit to be attached.

Answer: Yes, I suppose I wrote the letter, but now I don't remember it.

182nd Interrogatory: Do you remember receiving a letter from Caudle dated September 6, 1950, in which he said he had enjoyed seeing you the other day? (Pl. Ex. 144 to be attached).

Answer: I presume I did.

183rd Interrogatory: Do you remember seeing Mr Caudle just prior to September 6th, 1950?

Answer: I don't remember whether I did or whether I didn't.

184th Interrogatory: Did you at this time discuss with Mr. Caudle possible investments in other oil properties in which Mr. Bob Fletcher and Mr. Caudle had an interest?

Answer: No, I didn't.

185th Interrogatory: If so, state whether you had any further contact with Mr. Fletcher in any way, and if so explain what it was.

Answer: Either an oil royalty in Texas or Oklahoma. I don't know which. That was Mr. Fletcher.

186th Interrogatory: State whether you had information that Caudle had a commission arrangement with Fletcher on the sale of oil properties.

Answer: I do not know.

187th Interrogatory: Do you remember writing Caudle at his home on September 8, 1950, stating in part, "I will

have the letter from the doctor for you next week" and signed "Fondest regards,

Harry I. Schwimmer."

Plaintiff's Exhibit 107 to be attached.

Answer: I think I did, but I am not sure.

188th Interrogatory: If so, why did you send this to his private home and not the Department of Justice?

Answer: I can't say why I did.

189th Interrogatory: Do you remember a conversation with Mr. Sheffrey in which you told him of your desire to "give" some oil royalties to Caudle because of his attitude in the Sachs case?

Answer: No, I never did, and Mr. Sheffrey lied about that.

190th Interrogatory: State whether Sheffrey warned you not to do this because if Caudle accepted the oil royalty from you it would be disclosed.

Answer: He never did.

191st Interrogatory: State whether you told him in reply in substance that the royalties were in some other account or in another or a fictitious name.

Answer: I didn't say anything to Mr. Sheffrey.

192nd Interrogatory: State whether your practice of handling both the papers and the royalty checks in connection with both the Connelly and Caudle oil transactions, and having all papers addressed to them in care of your office, was intended to conceal these transactions.

Answer: No, it was not.

193rd Interrogatory: If not, why was this device used?

Answer: I don't know.

194th Interrogatory: Did you also act as Caudle's agent in handling his oil royalty checks?

Answer: No.

195th Interrogatory: On September 13, 1950, you wrote to Mr. Caudle and sent him a statement by Dr. Tureen wherein it was suggested that Sachs might attempt suicide.

Your letter [Plaintiff's Exhibit (D)] indicates the statement is transmitted "pursuant to our recent conference." To what conference are you referring?

Exhibit to be attached.

Answer: Well, I don't know, but it was in Washington.

196th Interrogatory: Who was present at that conference?

Answer: I don't know, but somebody was present, somebody else beside Mr. Caudle—and somebody else.

197th Interrogatory: Did Mr. Caudle suggest that you should raise the argument that Sachs might try suicide?

Answer: No, he didn't.

198th Interrogatory: Do you know who Dr. Bernard Cruvant is?

Answer: I don't know his name.

199th Interrogatory: Explain what his duties were and where he practiced in 1950 and 1951.

Answer: I don't know his name.

200th Interrogatory: Did you suggest the name of Dr. Cruvant to Mr. Caudle?

Answer: No.

201st Interrogatory: Did Dr. Cruvant have anything to do with the Sachs case?

Answer: I don't know whether he did or whether he didn't; but some place the name of Kerwent or Kerwin is possible to have existed.

202nd Interrogatory: I show you Plaintiff's Exhibit 114. Is this in your handwriting?

(Plaintiff's Exhibit 114 handed to the witness.)

Answer: I don't know. Read it and see.

Mr. Shenker: Let the reporter read it.

Mr. Cole: Excuse me. If I may say something—and this may be on the record—I don't think anybody should read it, because the question says "Is this in your handwriting?" Either he answers it or he does not.

Mr. Shenker: I'm sorry—

The Witness: I can't read it.

(The witness put on his eyeglasses.)

Mr. Imlay: Wait a second—he is putting on his glasses.

The Witness: I don't know what it says.

203rd Interrogatory: This paper, the evidence shows, was found in Mr. Caudle's desk in the Department of Justice. Do you know how it got there?

Mr. Imlay: May I suggest that the reporter read it to him now?

Mr. Cole: No.

Mr. Shenker: No.

Answer: No, I don't know.

Mr. Imlay: Wait a second, Mr. Reporter.

May the record show that there was a conversation about reading this exhibit—Mr. Harris and Mr. Cole.

Mr. Cole: And Mr. Shenker.

Mr. Imlay: What is the consensus here?

Mr. Cole: Are we on the record? Is all of this on the record?

My position with regard to this is very simple. Interrogatory No. 202 states as follows:

"I show you Plaintiff's Exhibit 114. Is this in your handwriting?"

The answer to that was simply, "I can't read it. I don't know what this says."

Now, I see nothing further to be done with regard to it.

Mr. Imlay: And what was your position, Mr. Harris?

Mr. Harris: I've got no particular position. I don't know what the exhibit is. I'm looking at it for the first time.

After having looked at it, I still don't know what it is. Well, it's all right.

The Witness: Read the next question.

204th Interrogatory: Did you ever meet Dr. Cruvant and if so, where, and for what purpose?

Answer: I don't remember ever seeing him.

205th Interrogatory: State whether Dr. Cruvant is related to Mr. Sachs.

Answer: I don't know.

206th Interrogatory: When the Sachs case was returned to the Internal Revenue Service, did you receive a check of $10,000 as an attorneys fee from Shu-Stiles, Inc.?

Answer: I don't know, but I presume I did.

207th Interrogatory: Did you inform your co-counsel that you were given this sum?

Answer: I don't know whether I did or whether I didn't.

(Whereupon at 3:40 P. M. the propounding of the interrogatories was concluded.)

Harry I. Schwimmer.

Subscribed and sworn to before me this 21st day of October, 1958.

Thomas F. Lambiase.

Thomas F. Lambiase
Notary Public for the State of New York
Qualified in New York County
No. 31-2239250
Commission Expires March 30, 1959

Notarial Certificate.

I, Thomas F. Lambiase, a Notary Public of the State of New York, do hereby certify that the foregoing interrogatories and counter-interrogatories were propounded by me to Harry I. Schwimmer, at his home, No. 4 Peter Cooper Road, Borough of Manhattan, City, County and State of New York, between the hours of 2:15 P. M. and 3:55 P. M. on Monday, September 29, 1958, and the hours of 2:05 P. M. and 3:40 P. M. on Tuesday, September 30, 1958.

I do further certify that counsel for the several parties were present as indicated on the title page of this deposition, and that Mrs. Jacquelyn Kanter and Dr. Walter Palmer were present as indicated thereon.

I do further certify that the said witness was by me duly sworn before the commencement of his testimony; that the testimony of the witness was taken stenographically by myself and then transcribed under my supervision; and that the within interrogatories and counter-interrogatories and the answers of the witness thereto are a true record of the testimony given by the aforesaid witness.

I do further certify that after the above-mentioned testimony was transcribed I went in person to the witness' home on October 21, 1958, where I read the complete record of the witness' testimony aloud to him (he being unable to read it himself); and that Mrs. Jacquelyn Kanter, the witness' daughter, was present during the reading of counter-interrogatories Nos. 43 to 103 and 132 to 207, and while the witness signed the transcript of his testimony.

I do further certify that I am not connected by blood or by marriage with any of the parties to this cause, nor am I interested directly or indirectly in the matter in controversy, nor am I in the employ of any of the counsel.

In witness whereof I have hereunto set my hand and seal of office in the County and State of New York this 22nd day of October, 1958.

Thomas F. Lambiase.

Thomas F. Lambiase,
Notary Public for the
State of New York
Qualified in New York County
No. 31-2239250
(Seal) Commission expires March 30, 1959.

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Appendix B
(Interrogatory 35, Matthew J. Connelly.)

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Appendix D
(U.S.A. counter-interrogatory 121)

United States District Court,
Eastern District of Missouri,
Eastern Division.

No. 28,439.

United States of America,
Plaintiff,

vs.

Matthew J. Connelly and
T. Lamar Caudle,
Defendants.

ORDER DENYING DEFENDANTS' MOTIONS FOR A NEW TRIAL UPON THE GROUND OF NEWLY DISCOVERED EVIDENCE.

This cause comes before the Court on the respective motions of the defendants for a new trial upon the ground of newly discovered evidence.

Mr. Jacob M. Lashly, Mr. John H. Lashly and Mr. Paul B. Rava (of Messrs. Lashly, Lashly and Miller), St. Louis, Missouri, and Mr. Alan Y. Cole, Washington, D. C., appeared in behalf of defendant Matthew J. Connelly;

Mr. C. Arthur Anderson, St. Louis, Missouri, Mr. Walter M. Haynes, Winchester, Tennessee, Mr. John J. Hooker and Mr. John J. Hooker, Jr., Nashville, Tennessee, and Mr. T. Lamar Caudle, Jr., Hilton Head Island, South Carolina, appeared in behalf of defendant T. Lamar Caudle;

Mr. Harry Richards, United States Attorney, St. Louis, Missouri, and Mr. Oliver O. Dibble and Mr. Carl H. Imlay, Attorneys, Department of Justice, Washington, D. C., appeared in behalf of the United States of America.

Since the imposition of the sentences on the 5th day of March, 1957, this matter has been before the United States Court of Appeals of the Eighth Circuit where the judgments on the sentences imposed were affirmed, 249 F. 2d 576. Later, application was made to the Supreme Court for a writ of certiorari which was denied, 356 U. S. 921. Application then was made to the Supreme Court for a rehearing on this denial of a writ of certiorari, which likewise was denied, 356 U. S. 964. The mandate of the Court of Appeals came down on May 22, 1958. On June 12, 1958, this Court filed its order denying the petition of defendant Caudle for probation under Section 3651, 18 United States Code, and the application of Matthew J. Connelly for probation thereunder or in the alternative for a reduction of sentence. Thereafter, defendants filed their motions for a new trial on the ground of newly discovered evidence in the alleged available testimony of Harry I. Schwimmer. On June 19, 1958, the Honorable Archibald K. Gardner, Chief Judge, United States Court of Appeals, Eighth Circuit, ordered that the commitment of defendants be stayed until such time as the District Court had heard and ruled upon the motions of the defendants for a new trial. Shortly thereafter, the defendants filed their motion to perpetuate the testimony of Harry I. Schwimmer on written interrogatories and cross-interrogatories on the ground that he was ill and infirm, and hence unable to give oral testimony either in court or by way of deposition. They alleged that his testimony was material and that it was necessary to take his deposition in order to perpetuate his testimony and prevent a failure of justice. Subsequently, after a hearing, this Court ordered that the deposition of the said Schwimmer be taken as requested. The defendants submitted interrogatories and the Government submitted cross-interrogatories, which interrogatories have been answered by the witness and are now on file herein. Defendants' motions for a new trial are based upon the testimony obtained in said deposition. In addi-

tion, certain oral testimony as to the mental competency of Schwimmer was taken before this Court on December 15, 1958, and the defendants also submitted in support of Schwimmer's mental competency the affidavits of Dr. Irving S. Wright, dated June 5 and June 20, 1958, Dr. Walter Palmer, dated December 9, 1958, Dr. Nathan S. Kline, dated December 7, 1958, George Nemeth, a therapist, dated August 13, 1958, and Francis W. Adams, a lawyer, dated August 1, 1958. In connection with Schwimmer's mental competency, the Government filed the report of one Dr. John E. Scarff, a neurologist, and the affidavit of an Internal Revenue agent, one E. Russell Kennedy, Jr. In addition, as bearing upon the merits of defendants' motions, the Government submitted the evidence of the said Schwimmer which was taken before the Grand Jury in the Eastern District of Missouri in November, 1955.

The factual background of this proceeding has been set forth fully in this Court's order of February 8, 1957, denying defendants' joint motion for an acquittal or in the alternative for a new trial, and in the decision of the Court of Appeals.

It is defendants' position that since Schwimmer, named as a defendant with them in the indictment, had a heart attack during the trial on May 23, 1956, which required a continuance of the trial proceedings until May 28, 1956, on which day the late Judge Hulen granted a mistrial as to him, he continued to be ill during the summer and fall of 1956 and suffered a very severe stroke on October 17, 1956, with a complete loss of the power of speech and a "flaccid paralysis of the right arm and leg." Furthermore, in support of the motions it is represented that Schwimmer's improvement did not become appreciable until the spring and early summer of 1958.

The Government does not attempt to challenge the showing as to Schwimmer's mental and physical condition from

the time of the trial to the time that the deposition was taken, but it urges that Schwimmer's present mental condition is such that any testimony given in answer to the interrogatories would be inadmissible on a new trial because of the apparent lack of memory of the witness and the confused and befuddled nature of his testimony. In addition, the Government contends that a new trial should not be granted because Schwimmer's testimony does not relate to matters discovered since the trial; that there is a lack of due diligence on the part of the defendants; that the testimony is merely cumulative and is not material to the issues involved; and lastly, that the proffered testimony is not of such a nature that on a new trial the defendants, or either of them, probably would obtain an acquittal.

A consideration of the record would seem to justify a finding that the evidence of Schwimmer is newly discovered in the sense that, since the mistrial was granted as to him, the defendants were not able to avail themselves of any testimony which he might be willing to offer, in their behalf. Admittedly, the evidence of Schwimmer was not newly discovered since the trial in that Schwimmer was a party to the trial proceedings from May 8, 1956, until May 28, 1956, when a mistrial was granted as to him by reason of his illness. However, there was no opportunity for these remaining defendants to avail themselves of Schwimmer's testimony by reason of his illness, and it reasonably appears that, on account of a stroke in October, 1956, his mental and physical condition did not permit the taking of any statement or deposition from him until the spring or early summer of 1958. On this showing, therefore, the Court cannot say that the defendants have not acted with due deligence.

It is true that there was a hearing as to the admissibility of the Plaintiff's Exhibit 100-J before a mistrial was

granted Schwimmer. But the question before the Court at that time primarily involved Schwimmer's objection to that exhibit upon constitutional grounds, although defendants Connelly and Caudle had lodged a general objection to the exhibit when it was first offered. However, Schwimmer never was available to the defendants as a witness as to this exhibit before he was excused from the trial. Consequently, it seems that the Court must hold that the testimony given by Schwimmer in his deposition is not only newly discovered, but is relevant, and that it is not entirely cumulative, although in many respects it only tends to corroborate the evidence that the defendants had offered heretofore in their behalf at the trial.

It is evident from the showing herein that we are dealing with a witness who has decided infirmities in his memory. The deposition is replete with examples of his blocked off memory and lapses in his continuity of thought. Undoubtedly there may be a basis for the conclusion of Dr. Scarff when he states,

> "In summary, it is this examiner's opinion that Mr. Harry I. Schwimmer does not have either the physical or mental capacity to answer, in either oral or written form, any questions pertaining to matters which took place prior to his cerebrovascular accident which occurred on October 17, 1956."

On the other hand, there is the affidavit of Schwimmer's attending physican who was present when the deposition was taken, and he states,

> "On the basis of my observations during the course of the propounding of the interrogatories it is my opinion that Mr. Schwimmer had the capacity to understand the significance and meaning of the questions propounded to him and the ability to answer them. Mr. Schwimmer's difficulty was principally in

communicating his responses, but his answers generally seemed to be responsive to the questions posed."

My considered view is, however, that, in the event a new trial were granted, Schwimmer's deposition should be received and considered by a jury. But, although it is my opinion that he is a competent witness and that the weight and credibility of his testimony is for the jury, the frequent incoherent and vague answers in his deposition are highly important and relevant in determining whether or not it is probable that, if a new trial were granted, these defendants, with the addition of this newly discovered evidence to the present record, would be acquitted. An affirmative answer to this question is one of the necessary criteria which must be established before a new trial can be granted on the ground of newly discovered evidence.

Schwimmer is still under indictment in this proceeding. He also is under indictment for the alleged perjurious testimony he gave before the Grand Jury in November, 1955. It seems evident that, by his own admissions in the present deposition, he gave false testimony before the Grand Jury which was investigating this case. Moreover, there can be no possible question in light of the evidence at the trial that Schwimmer and Sachs conspired corruptly to influence high officials in the Government of the United States in the prosecution of the tax case against Sachs. The obtaining of oil royalties for Connelly and Caudle, which of course is admitted, was motivated by no other purpose than to obtain the assistance of their good offices in order to aid Schwimmer and Sachs in the achievement of their conspiracy, to wit, the declination of the Department of Justice to prosecute Sachs criminally.

Defendants now contend with great earnestness that, in the light of Schwimmer's testimony, Plaintiff's Exhibit 100-J could not be received in evidence against them.

However, that contention is without any sound basis for its support. When Schwimmer gave his testimony before the Grand Jury in November, 1955, he stated that the $10,000 which he received from Sachs in October, 1949, was paid to him as a retainer fee; that he had decided to ease up his labors as a lawyer by reason of his health and had determined to take fewer clients, but to charge them a higher fee; that it was in pursuance of that decision that he called upon Shu-Stiles to pay him $10,000 as a retainer fee in the Sachs tax case. Moreover, he told the Grand Jury that he paid no part of the $10,000 directly or indirectly for the benefit of Connelly and Caudle, and that he entered the payment of that sum in his journal book as attorney's fees. Obviously, that testimony was false and must be recognized as such in view of the exhibit itself and in light of Schwimmer's answer to certain questions in the interrogatories in his present deposition. Schwimmer states in his deposition that the journal was maintained for income tax procedure. But again it must be observed that his testimony in that regard is so patently contradicted by his other answers to the interrogatories that no credence can be placed thereon. He was unable to explain why he had entered the $2,500 loan in an alleged tax record and was not able to state whether he had ever paid any income tax on the $10,000 payment. He admits that the Connelly royalty was paid out from the $10,000 fund which he received from Sachs. The fact that Exhibit 100-J indicates that the Connelly royalty cost some $4,200 instead of $3,600 is of no particular significance. And, moreover, although the oil royalty for Connelly was not purchased until December, 1949, and the entry in the record was noted as of October, 1949, such variance is of no particular consequence in that the conspiracy had not ended on either date. The record impels one to find that the $10,000 paid to Schwimmer by Sachs was a slush fund for the purpose of aiding Schwimmer in his machinations

to free Sachs from criminal prosecution. Although the Sachs case was not dropped contrary to the designed scheme and plan of the conspirators, the entire $10,000 went to Connelly and Schwimmer.

In their motion for a new trial, defendants labor the apparent difficulties which confronted the late Judge Hulen when he first considered the admissibility of Exhibit 100-J. But any question or uncertainty in that regard now has been set at rest by the decision of the Court of Appeals. And it is clear that Schwimmer's deposition testimony has not weakened the basis for the admissibility of that document as relevant and competent evidence as to each of these moving defendants. If there ever was any real basis for doubt as to the admissibility of Exhibit 100-J, it seems indubitably clear now that the entries thereon were acts of a co-conspirator during the existence of the conspiracy and in the furtherance thereof. As this Court stated in its order of February 8, 1957,

> "Government Exhibit 100-J did not represent a mere narrative event, but it consists of an act of a conspirator who was handling the fund by and through which the conspiracy was to be accomplished. The entry consists of a recording of the receipt of the first anticipated disbursement thereof and the earmarking of the remaining funds for the purpose of carrying out the conspiracy. To earmark or allocate the remainder of a slush fund which has been created for the purpose of consummating an unlawful conspiracy would be an act in furtherance of such conspiracy."

The fact that Schwimmer now states that the remaining $6,400 after the purchase of the Connelly royalty went to him rather than to either of these defendants is of no controlling significance. The important fact is that Connelly received a $3,600 royalty out of a fund that was paid by

a taxpayer who was attempting through his attorney and co-conspirator, by corrupt means, to pollute the administration of justice.

Another evidentiary item which the defendant Connelly emphasizes as having been explained or clarified by Schwimmer's testimony is the letter he wrote to Connelly on January 5, 1948. It is significant, of course, that this letter was written about a week after Schwimmer had been retained in the tax case. It reads (Plaintiff's Exhibit 102):

"Dear Matt:

Tom informed me of your kindness in offering to help me, which I sincerely appreciate.

It was my original plan to leave for Washington some time this week. However, unfortunately my wife's father passed away unexpectedly, and, of course, it will be necessary for me to stay here for a little while longer.

I hope now to leave Kansas City about the 17th of this month, and if I may, I will call or wire you as to the date when I will be in Washington.

With fondest regards to you all, I am

Sincerely,

Harry I. Schwimmer"

After Schwimmer's return from Washington where he had contacted Connelly, who had arranged an appointment for him with the Commissioner of Internal Revenue, Schwimmer wrote Connelly as follows under date of January 28, 1948.

"I want to thank you, Matt, for the privilege of being with you and the courtesies extended. If there

is ever at any time anything that I can do for you, I am your willing and obedient subject."

In his deposition Schwimmer testified that the letter of January 5, 1948, referred to the so-called "helium" matter in which he was interested, and not to the tax case. Connelly gave similar testimony at the trial. Likewise, Tom Evans, who is the "Tom" referred to in the January 5th letter, testified at the trial that Connelly's offer of assistance had reference to the helium matter and not to the Sachs case because he, Evans, knew nothing about the tax controversy. Schwimmer's deposition testimony in this regard merely assumes to corroborate testimony which was given at the trial by the witness Evans and defendant Connelly. At best, the alleged corroboration is of questionable probative value. When Schwimmer was asked in one of the cross-interrogatories why he was going to Washington as he related in his letter of January 5, 1948, to Connelly, he answered, "I don't know." Then he was asked; "Did you come to Washington on or about January 17, 1948?" His answer was "I don't know." And when asked "What did you do in Washington on that occasion?" he answered "I don't know. I simply don't know what I did or what I didn't do." Although Schwimmer at one time had a so-called helium matter as to which he may have made trips to Washington, the entire showing strongly negates the truthfulness of his explanation of the January 5, 1948, letter to Connelly. Certainly, the $3,600 made available to Connelly from the $10,000 slush fund was not an honorarium to him for services in any helium matter.

In considering these motions, the Court must begin with the premise that there was sufficient evidence before the jury to sustain the guilt of these defendants beyond a reasonable doubt of the charge contained in the indictment. The Court must conclude also that on the trial record Ex-

hibit 100-J was an evidentiary document competent as to each of these defendants in that there was sufficient evidence without the consideration of Exhibit 100-J to find that these defendants were parties to the conspiracy charged and that this document was made by a fellow conspirator during its existence and in furtherance thereof. Moreover, as the Court of Appeals held, there was "independent evidence that on October 12, 1949, co-conspirator Sachs, president of Shu-Stiles, Inc., gave Schwimmer a $10,000 check in addition to the prior payment of $2,500 on September 22, 1949, both of which are reflected in this exhibit." The variance between the date of the entry as to the Connelly royalty purchase and the actual date of the purchase was made to appear at the trial, and the Court of Appeals held that this fact did not vitiate the competency or verity of this exhibit. It is true that Schwimmer does say in his deposition that it was his intention that the $6,400 remaining in the alleged escrow fund after the $3,600 was paid for the Connelly royalty was to go to him when and if the Sachs case was dropped, and not to Connelly or Caudle. But that evidence does not impair the admissibility of the document. Moreover, it does not affect the persuasive weight which must be attached to the language of this exhibit and the undisputed fact that Connelly did receive a $3,600 oil royalty from the fund.

At the trial, Tom Evans testified that Schwimmer informed him that he, Schwimmer, would like to do something for Connelly in that the latter "had been so very nice to me." In his deposition, Schwimmer unequivocally denies that he made any such statement to Evans. Moreover, Evans also testified at the trial that Schwimmer told him "why can't I buy him an oil royalty that would produce for him thirty, forty, or fifty dollars a month?" But in his deposition, Schwimmer also denies that he made that statement to Evans. Consequently, that portion of

Schwimmer's testimony only assumes to impeach the testimony of Connelly's close friends. Schwimmer does admit, however, that Evans loaned Connelly the $750 to buy the royalty which cost $3,000; and it is not denied in the deposition that the transaction was handled in a most circuitous manner with Evans sending a check to Connelly for $750, whereupon Connelly sent his check to Schwimmer for that amount in order to purchase the oil royalty and that later Schwimmer repaid Evans the $750 loan which had been made to Connelly. All of the communications were directed to Connelly's home address rather than to his office, and Schwimmer was unable to give any explanation as to why these transactions were handled in this manner.

The close, intimate relationship which existed between Caudle and Schwimmer during the existence of the Sachs case is evident by the correspondence that took place between them, and this friendly relationship continued up to the time of the Grand Jury investigation in 1951 regardless of the testimony of Caudle that Schwimmer had had the effrontery in August, 1950, to buy an oil royalty for him and place it in his name without his knowledge, all of which resulted in his alleged blistering attack on Schwimmer when he learned of the oil royalty transaction. Schwimmer's deposition testimony assumes, in part, to corroborate Caudle's testimony in this regard. However, in other respects his testimony utterly fails to explain the letters that Schwimmer wrote during the time that he was negotiating for and after he had purchased an oil royalty for Caudle. It must be apparent that the jury did not accept the explanation given by Caudle for this oil royalty transaction in light of all the evidence that it heard on this subject. It is admitted that Caudle signed the transfer order after he knew that the oil royalty had been placed in his name, and that he had endorsed at least three of the royalty checks which later were sent back to Schwimmer, who cashed them and put the funds in a money order which

he kept and did not cash until on or about January 31, 1952, in Puerto Rico. Moreover, it is not denied that Caudle did not divest himself of the oil royalty interest until April, 1951, which was after the investigation of the Grand Jury of the Sachs case, and at which time he wrote a note to Schwimmer stating that the transfer had been made "to correct the error that was made in this matter." This delay, allegedly due to Schwimmer's illness, is not borne out by the record. Schwimmer was able to handle business transactions long after Caudle was informed of the oil royalty purchase.

According to Attorney Sheffrey, who was co-counsel with Schwimmer in the Sachs case and who testified at the trial, Schwimmer told him that he desired to give Caudle some oil royalties because of Caudle's attitude in the Sachs case, and when Sheffrey warned him that an honest man did not do such things and that the transaction would eventually be disclosed, Schwimmer said that the royalties were or could be placed in a fictitious name. Schwimmer denies this conversation in his deposition and asserts that Sheffrey lied. But notwithstanding all of the protestations of Schwimmer to the effect that Caudle knew nothing about the oil royalty purchase and that he protested against it on or about August 4 or 5, 1950, he could give no satisfactory explanation in his testimony as to why on September 18, 1950, he wrote to Mr. Rhodes, through whom the oil royalty had been obtained, that Caudle had asked about the delay in the receipt of the royalty checks. And when asked a direct question as to whether or not he told the truth in this letter about Caudle's asking about the delay in the receipt of the oil royalty checks, his answer was, "No, it—well, how shall I answer, yes or no? I said Caudle had nothing to do with that royalty." And regarding plaintiff's Exhibit 76-L, which was a letter written by Schwimmer to Chris Rhodes in July, 1950, in which he indicated that he would be willing to pay $3,300 for an oil

royalty, and in which letter he stated, "I have to wait to get this information to the other person interested, which should take a couple days, then you will hear from me. However, I am pretty confident he will take it." Schwimmer in his deposition on being asked if he wrote the letter replied, "Well, I don't admit that I sent the letter, but I was pretty close to that." And when asked "Who was the other person you referred to" in the letter, he answered, "I don't know."

This case has been pending in the courts since 1956. The events of the controversy date back to November 1, 1945. Almost three years have elapsed since these defendants were tried and convicted. This Court is charged now with the duty of determining whether, in light of the present trial record, with the additional deposition testimony of co-conspirator Schwimmer, the greater portion of which is merely corroborative or impeaching, a jury probably would acquit these moving defendants, or either of them. There is no showing that Schwimmer's mental condition will improve; in fact, the showing presented to the Court in support of defendants' petition to perpetuate his testimony, indicated that he might die any day and the utmost dispatch of the deposition proceedings was highly necessary. Consequently, the Court must assume that there is no likelihood that Schwimmer's mental condition will be better. It probably will worsen. Moreover, there is no showing that, if a new trial were granted to these defendants, Schwimmer in his physical and mental condition would be able to face the ordeal of a criminal court proceeding against him as a co-defendant. To predict what a jury would do in appraising Schwimmer's testimony is of course something the Court cannot determine with any mathematical certainty. Whether, if sitting as a trier of the facts, I would probably acquit or convict the defendants in view of the additional proffered evidence by way of Schwimmer's deposition, is not determinative of the ques-

tion. But after a careful and painstaking consideration of the trial record and the bases now offered for a new trial, it is my considered opinion that it is not probable that the proffered testimony would result in an acquittal for these defendants in the hands of another jury. Although there is corroboration in Schwimmer's deposition for some of the testimony offered by Connelly and Caudle in their defense, the evidentiary picture as to them remains substantially the same when one considers the weight which would in all probability be given by a jury to the corroborating evidence.

The Court has not attempted to review herein all of Schwimmer's testimony, but it seems evident that, notwithstanding his general denial of any intentional wrongdoing on his part or on the part of Connelly and Caudle as charged in the indictment, his conduct as disclosed by the record speaks far more persuasively in that regard. From the outset it is apparent that, in the Sachs case, he was, in common parlance, the "fixer". His approach to the Sachs case was to ingratiate himself with high government officials by any means which would bring about a favorable result for his client. He was not a tax lawyer and knew that he had no defense in the Sachs tax fraud, although for a time he did urge a wholly unsupported contention that there had been a voluntary disclosure. He was the arch conspirator in the scheme and plan condemned by the jury in its verdict against these defendants. He is an admitted perjurer. His motives from the beginning were venal and corrupt. No other explanation can be made for his purchase of the oil royalties for the two top government officials with whom he was dealing. It is simply incredible that the offering of the fragmentary deposition testimony of this discredited witness in support of the defendants' alleged innocence could possibly have the weight and effect of producing an acquittal for these defendants, or either of them. In fact, they would have a far better

opportunity to obtain a favorable verdict from a jury without attempting to utilize as a crutch the aid of one whose alignment with them could have no other effect than to poison the minds of a jury against them. I have a strong conviction that the motions for a new trial on the ground of the newly discovered evidence of Schwimmer is merely a vehicle utilized by the defendants to obtain another trial, rather than to use his testimony in their behalf with the expectation that, in light of the present record, it would have sufficient weight with a jury to bring about an acquittal. It seems inconceivable that the additional evidence of the one who spawned the plan and scheme to corrupt government officials could have any weight in producing a verdict other than that which was returned by the jury.

The Court concludes, therefore, after due consideration, that the defendants' motions, and each of them, for a new trial upon the ground of newly discovered evidence should be, and hereby are, in all things denied. It is so ordered. An exception is allowed.

Dated this 4th day of March, 1959.

By the Court:

Gunnar H. Nordbye,
United States District Judge.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 16,213

Matthew J. Connelly and T. Lamar Caudle, Appellants,
v.
United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[November 9, 1959.]

John H. Lashly and Alan Y. Cole (Jacob M. Lashly, Paul B. Rava, and Lashly, Lashly & Miller were with them on the brief), for Appellant Matthew J. Connelly.

T. L. Caudle, Jr. (Walter M. Haynes, C. Arthur Anderson and John J. Hooker were with him on the brief), for Appellant, T. Lamar Caudle.

Oliver Dibble, Attorney, Department of Justice (Malcolm R. Wilkey, Assistant Attorney General, and Donald C. Bush, Attorney, Department of Justice), for Appellee.

Before GARDNER, VOGEL, and VAN OOSTERHOUT, Circuit Judges.

GARDNER, Circuit Judge.

Appellants, with one Harry I. Schwimmer, were indicted for conspiracy to defraud the United States of the proper administration of Internal Revenue Laws and regulations and of the proper and faithful service of appellants, in violation of Section 371, Title 18, United States Code. We shall refer to appellants as defendants.

In the course of the trial Harry I. Schwimmer, who had been indicted with defendants, suffered a heart attack, whereupon a mistrial was granted as to him and the cause proceeded against the other defendants. The jury returned a verdict of guilty, but the trial judge departed this life before the entry of judgments. In due course, the Honorable Gunnar H. Nordbye, United States District Judge for the District of Minnesota, was designated as successor judge. Motions for judgments notwithstanding the verdict were presented to and denied by Judge Nordbye and judgments and sentences were thereupon entered. From the judgments and sentences thus entered defendants appealed to this court and the judgments of conviction were affirmed. 249 F.2d 576. Defendants then petitioned the Supreme Court for certiorari, which was denied. 356 U.S. 921. They then applied for rehearing of their petition, which was likewise denied. 356 U.S. 964. Defendants then applied for probation under Section 3651, Title 18, United States Code, which applications were denied. Each of the defendants then moved for a new trial on the ground of newly discovered evidence in the alleged available testimony of Harry I. Schwimmer, their co-defendant, as to whom a mistrial had been granted. These motions were denied on the ground, among others, that the evidence would not probably result in an acquittal if a new trial were granted. This appeal followed.

By way of preface, it may be stated that motions for new trial on the ground of newly discovered evidence are looked upon with disfavor and it is equally well settled that

such motions are addressed to the judicial discretion of the trial court and its decision will not be reversed on appeal except for a clear abuse of that discretion. **United States v. Johnson**, 327 U.S. 106; **Long v. United States**, 10 Cir., 139 F.2d 652; **Casey v. United States**, 9 Cir., 20 F.2d 752; **United States v. Hiss**, D.C. N.Y., 107 F.Supp. 128, aff'd. 201 F.2d 372; 23 Corpus Juris Secundum, Section 1453, p. 1224. In **Long v. United States**, supra, the Court of Appeals for the Tenth Circuit, in affirming an order denying a motion for new trial on the ground of newly discovered evidence, states the applicable rule of procedure as follows:

> "It is well settled that the matter of granting a new trial on after-discovered evidence rests in the sound judicial discretion of the trial court, and an order refusing a new trial on that ground will not be disturbed on appeal, in the absence of a plain abuse of discretion. **Wulfsohn v. Russo-Asiatic Bank**, 9 Cir., 11 F.2d 715; **Streckfus Steamers, Inc. v. Shuttleworth**, 4 Cir., 86 F.2d 327; **Morton Butler Timber Co. v. United States**, 6 Cir., 91 F.2d 884; **Weiss v. United States**, 5 Cir., 122 F.2d 675. And it is equally well settled that an application for new trial based upon that ground is not regarded with favor and will be granted with great caution. **Bonness v. United States**, 9 Cir., 2 F.2d 754; **Weiss v. United States**, supra; * * * "

The prevailing rule is thus stated in 23 Corpus Juris Secundum, Section 1453, supra:

> "The granting or the refusal of the motion rests very largely in the sound discretion of the trial court, the prime consideration being whether or not substantial justice has been done, and, in the absence of an abuse of such discretion, its ruling will not be interfered with by appellate tribunals. The courts, however, have always listened distrustfully to the claim of

newly discovered evidence, and as a ground for a new trial it is not favored."

It is urged in the briefs of defendants that the question of the credibility of witnesses and the weight to be given to their testimony is exclusively a function of the jury and cases are cited wherein the court in its instructions to the jury invaded the province of the jury as to this function. This rule, however, is applicable only where the issue is tried to a jury. In issues tried to the court it is the function of the court to determine the issues of fact and the credibility of testimony. A motion for new trial on the ground of newly discovered evidence is heard by the trial judge and it is his function to determine the credibility of all evidence that may be produced. 23 Corpus Juris Secundum, Section 1461, p. 1253; **United States v. Peller**, D.C. N.Y., 151 F.Supp. 242; **Johnson v. United States**, 8 Cir., 32 F.2d 127. The rule is succinctly stated in 23 Corpus Juris Secundum, Section 1461, supra, thus:

> "The trial court has the right to determine the credibility of newly discovered evidence for which a new trial is asked, and if the court is satisfied that, on a new trial, such testimony would not be worthy of belief by the jury, the motion should be denied."

It is further argued that the court did not get the "feel of the case" because the witness, Schwimmer, did not appear on the witness stand and his demeanor could not have been observed by the court. In this case the testimony of the witness was secured by the answers to direct and cross interrogatories. The short answer to this argument would seem to be that the procedure in this case was not exceptional as the general practice is to support motions for a new trial on the ground of newly discovered evidence by affidavit. The court had before it and was familiar with every syllable of the questions and answers of this witness,

and the court also had before it affidavits as to the witness's mental and physical condition, and the court had had unusual occasion and opportunity to be familiar with all the testimony that had been presented in the trial of this case. This court in **Johnson v. United States**, supra, announced a formula for testing the sufficiency of evidence warranting the granting of a new trial on the ground of newly discovered evidence. This may be summarized as follows: (a) the evidence must be in fact newly discovered, i. e., discovered since the trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence relied on must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal.

There was evidence which would have warranted the court in finding the witness incompetent to testify because of his physical and mental condition. The court, however, resolved that conflict in favor of defendants but held that the evidence was to a considerable extent simply corroborative of the testimony given at the trial or was in contradiction to certain testimony given at the trial, that the witness by his own testimony had committed perjury in his testimony before the Grand Jury, that he was under indictment for perjury and in effect that his testimony was not worthy of belief. The findings of the court on this hearing should not be disturbed unless clearly erroneous and we think they are sustained by substantial evidence. In **United States v. Johnson**, supra, it is said:

> "Since we think it important for the orderly administration of criminal justice that findings on conflicting evidence by trial courts on motions for new trial based on newly discovered evidence remain undisturbed except for most extraordinary circumstances, we granted certiorari."

In deciding this motion the court, as was its function, determined that the evidence offered, so far as material, was incredible. After reviewing the evidence presented, the court's conclusions are reflected in the closing paragraphs of its decision, which reads as follows:

"The Court has not attempted to review herein all of Schwimmer's testimony, but it seems evident that, notwithstanding his general denial of any intentional wrongdoing on his part or on the part of Connelly and Caudle as charged in the indictment, his conduct as disclosed by the record speaks far more persuasively in that regard. From the outset it is apparent that, in the Sachs case, he was, in common parlance, the 'fixer'. His approach to the Sachs case was to ingratiate himself with high government officials by any means which would bring about a favorable result for his client. He was not a tax lawyer and knew that he had no defense in the Sachs tax fraud, although for a time he did urge a wholly unsupported contention that there had been a voluntary disclosure. He was the arch conspirator in the scheme and plan condemned by the jury in its verdict against these defendants. He is an admitted perjurer. His motives from the beginning were venal and corrupt. No other explanation can be made for his purchase of the oil royalties for the two top government officials with whom he was dealing. It is simply incredible that the offering of the fragmentary deposition testimony of this discredited witness in support of the defendants' alleged innocence could possibly have the weight and effect of producing an acquittal for these defendants, or either of them. In fact, they would have a far better opportunity to obtain a favorable verdict from a jury without attempting to utilize as a crutch the aid of one whose alignment with them could have no other effect than to poison the minds of a jury against

them. I have a strong conviction that the motions for a new trial on the ground of the newly discovered evidence of Schwimmer is merely a vehicle utilized by the defendants to obtain another trial, rather than to use his testimony in their behalf with the expectation that, in light of the present record, it would have sufficient weight with a jury to bring about an acquittal. It seems inconceivable that the additional evidence of the one who spawned the plan and scheme to corrupt government officials could have any weight in producing a verdict other than that which was returned by the jury."

We have not attempted to reproduce the testimony embodied in the deposition of Schwimmer. We have, however, examined it with great care and we are familiar with the record embodying the testimony produced on the trial of this case, having twice reviewed it. From the knowledge thus gained we are of the view that the trial court properly evaluated it and that there was no abuse of its judicial discretion in denying the motion for new trial on the ground of newly discovered evidence. The order appealed from is therefore affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals Eighth Circuit.

(JUDGMENT.)

United States Court of Appeals for the Eighth Circuit.

No. 16,213—September Term, 1959.

Matthew J. Connelly and T. Lamar Caudle,

Appellants,

vs.

United States of America.

Appeal From the United States District Court for the Eastern District of Missouri.

This cause came on to be heard on the original files of the United States District Court for the Eastern District of Missouri and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Order of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

November 9th, 1959.

(ORDER DENYING PETITION OF APPELLANT, MATTHEW J. CONNELLY, FOR REHEARING.)

United States Court of Appeals for the Eighth Circuit.

No. 16,213—September Term, 1959.

Matthew J. Connelly and T. Lamar Caudle, Appellants,

vs.

United States of America.

Appeal From the United States District Court for the Eastern District of Missouri.

The Petition for Rehearing filed by the appellant, Matthew J. Connelly, in this cause, having been considered by this Court, it is now here Ordered that the same be, and it is hereby, denied.

December 14, 1959.

(ORDER DENYING PETITION OF APPELLANT, T. LAMAR CAUDLE, FOR REHEARING.)

United States Court of Appeals for the Eighth Circuit.

No. 16,213. September Term, 1959.

Matthew J. Connelly and T. Lamar Caudle, Appellants, vs. United States of America.	Appeal from the United States District Court for the Eastern District of Missouri.

The Petition for Rehearing, filed by the appellant, T. Lamar Caudle, in this cause, having been considered by

this Court, it is now here Ordered that the same be, and it is hereby, denied.

December 14th, 1959.

Supreme Court of the United States.

No. ..... October Term, 1959.

Matthew J. Connelly and
T. Lamar Caudle

Petitioners,

v.

United States.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI.

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 12th, 1960.

(s) Hugo L. Black,
Associate Justice of the Supreme
Court of the United States.

Dated this 29th day of December, 1959.

FILE COPY

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FILED
MAR 18 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 704

T. LAMAR CAUDLE, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF OF PETITIONER

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March 18, 1960.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 704

T. LAMAR CAUDLE, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF OF PETITIONER

The brief for the United States in opposition to the petition serves only (1) to highlight the importance of the questions presented in the petition and (2) to compound the confusion and conflict surrounding those questions.

Significantly, the United States at no point in its brief states what it believes to be the proper standard for reviewing the impact on a new trial of newly discovered evidence. Reference is there made to the "probable acquittal" version only in terms of petitioner's criticism thereof and in terms of that version representing "the very great weight of authority" in

the lower federal and state courts. Brief, p. 18.[1] But the Government does not affirmatively adopt or urge this formulation of the standard. Nor does the Government deny the fact (Petition, pp. 18-22) that there are at least four different versions of this criterion and that this Court has never adopted or approved any of those four as enunciated in the lower courts. The conflicting formulations and meanings must stand as conceded.

Moreover, the Government does not and cannot deny that a patent conflict exists between the various rules applied in the lower courts, including the "probable acquittal" version, and this Court's statement in *Griffin* v. *United States*, 336 U.S. 704, 709, that the new trial motion was there to be tested by whether it would be too dogmatic for a court to conclude "that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before it." The Government now speculates (Brief, pp. 17-18) that this Court did not intend to apply that formulation to all motions for new trial and that the Court was doing no more than "disposing of the capital case before it."

But the absence of any limiting conditions on the *Griffin* language, especially in light of the considerations put before the Court, makes it inappropriate to

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[1] Also significant is the fact that the Government, in restating the rule of the lower federal courts, speaks not of the probability of "acquittal" but of the probability of "a different verdict." Brief, p. 18, note 5. And see Petition, p. 20, note 14. Moreover, one of the cases cited by the Government, *Heald* v. *United States*, 175 F. 2d 878, 883-4 (C.A. 10), also refers to the probability of a "different result" rather than of an "acquittal." As noted in the Petition, p. 20, that difference between an "acquittal" and a "different verdict or result" can be vital.

distinguish the case on such speculative grounds. The Court was there made fully aware of what the Government thought was the prevailing formulation in the lower federal and state courts. And the Government frankly made a significant concession that such a formulation was too harsh "where the offense in question is of a serious type, and particularly in a capital case." (See Petition, p. 16). If the Court had wished to approve one of the lower court versions or to accept the Government's suggested modification, or to limit its own formulation to capital cases, it could easily have done so. But the Court did none of those things. The *Griffin* criterion was knowingly established by this Court and if any limitations are now to be made as to non-capital cases only this Court can do so. The instant case thus affords an opportunity to study and clarify this clear conflict.

In avoiding a commitment on the proper standard, the Government relies heavily on *United States* v. *Johnson*, 327 U.S. 106. That case narrowly circumscribed appellate review of a District Court's findings on conflicting evidence relative to a new trial motion, at least where the judge dealing with the motion also presided at the original trial. But that case is no answer to petitioner's complaint that the District Court in the instant case, in making its findings, applied a standard which is improper, confusing and unapproved by this Court. To make findings in light of such an improper and uncertain test is manifestly an error of law and therefore outside the scope of the *Johnson* case.

The Government asserts, however, that there is no occasion here for the Court to determine whether the criterion used below is appropriate for all motions for a new trial based on newly discovered evidence. Brief, p. 16. But the three reasons advanced in support of

that assertion reflect a distortion both of the record and of petitioner's contentions:

(1) Contrary to the Government's statement, petitioner did not frame the issue in his motion in the District Court in terms which he now criticizes the court for restating in his own terms. Petitioner's motion (R. 51) merely sought to summarize the nature of the newly discovered evidence and alleged that if the Schwimmer testimony had been before the court and jury at the original trial—in contrast to a new trial—"he should have won an acquittal and been acquitted and been exonerated by the Court and jury instead of convicted."[2] That assertion was accompanied by an argument in the supporting brief (R. 384) that a sharp distinction was to be drawn between the use of the five verities mentioned in *Johnson v. United States*, 32 F. 2d 127, 130 (C.A. 8)—including the "probable acquittal" rule—and the use of the standard mentioned in *Pettine* v. *Territory of New Mexico*, 201 Fed. 489 (C.A. 8), relative to new evidence tending to prove that evidence given at the original trial was false and misleading.[3] The argument was made that since Schwimmer's testimony tended to prove false the im-

[2] Petitioner's motion also alleged (R. 51) that the evidence introduced at the trial without explanation "when explained by Schwimmer, the only person who knew the explanation, would have strongly tended to exonerate the defendant from the implications and inferences upon which the verdict of guilty depended."

[3] The *Pettine* rule is essentially the rule applied in the more recent recantation cases. There the "probable acquittal" rule is abandoned and attention is focused on the possibility that without the false testimony the jury at the original trial might have reached a different conclusion. See Petition, p. 21. Petitioner thus contended for a standard which in every vital respect—looking backward instead of forward; and dealing with a possibility rather than a probability—differed from the "probable acquittal" impact on a new trial emphasized by the District Court.

plications drawn from his unsworn letters and statements introduced at the trial the *Pettine* rule rather than the *Johnson* verities should be applied. Petitioner focused attention on the impact of the new evidence on the *original* trial rather than on the *new* trial should one be granted.

Petitioner's contention in the District Court thus differed materially from the standard applied by the court, a standard which ignored the possibility of a different result ensuing at the original trial and concentrated instead on the probability of an acquittal resulting on a new trial. And that contention was renewed by petitioner in the Court of Appeals, accompanied by an argument that the "probable acquittal" standard adopted by the District Court was too "high" and was "in conflict with other decisions of this court and in conflict with decisions from other circuit courts."[4]

(2) The Government's assertion that Judge Nordbye's "ultimate conclusion" and the "entire tone" of his opinion went beyond the "probable acquittal" rule and met "the loosest standard" for which petitioner now contends is utterly baseless. The so-called ultimate conclusion—that to Judge Nordbye it seemed "inconceivable that the additional evidence of the one who spawned the plan and scheme to corrupt government officials could have any weight in producing a verdict other than that which was returned by the jury"—is justified by none of the known standards, loose or otherwise. All of those standards concentrate on the possibility or probability of the *substance* of the new evidence having some sort of impact. But Judge Nordbye, as well as the Court of Appeals and the Gov-

[4] Petitioner's brief in Court of Appeals, p. 31.

ernment before this Court, ignored in large part the *substance* of Schwimmer's new testimony and focused instead upon his venal nature and his position as "the one who spawned the plan and scheme to corrupt government officials." Far from satisfying any of the standards, such a personalized assault upon the credibility of a witness invades the function of the jury and constitutes an abuse of discretion. See Petition, pp. 25-27.

(3) The final contention of the Government that the "possible difference in criteria applied by different courts" mainly has significance where an important Government witness has allegedly perjured himself at the trial overlooks the fact that petitioner has consistently maintained that the rule in the recantation cases—the "might have reached a different conclusion" version—is applicable in the instant case. While no Government witness has here recanted, the critical documents used at the trial—the unsworn letters and records of Schwimmer—have now been explained and the inferences drawn therefrom to support the conviction have been shown to be false. The documents in a real sense have recanted. That is reason enough to apply the recantation standard as to a new trial motion.

The Government's frontal assault (Brief, pp. 22-23) upon the reliability and credibility of Schwimmer, found by the District Court to be a competent witness, constitutes an abject repudiation of one who in effect was the main support of the Government's case. The conviction concededly rested upon the inferences and conclusions to be drawn from the unsworn and unexplained statements, letters and records of Schwimmer—this "admitted perjurer", this spawner of "a plan to corrupt government officials", this poisoner of "the minds of a jury against petitioners". The Govern-

ment now asserts that his unreliability is obvious. But the Government blandly ignores the impact of that asserted unreliability upon Schwimmer's documentary evidence. Is that not equally incredible and unbelievable, particularly when the evidence is used to support the conviction of persons other than Schwimmer himself?

In short, the Government has undermined the very basis of its own case. The critical evidence upon which the conviction rested has been tainted by Schwimmer's venal character. And it has been proved false by his new admissions against his own interest.[5]

For these reasons, as well as those expressed in the petition for a writ of certiorari, the writ should issue.

Respectfully submitted,

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[5] Far from being incriminatory of petitioner (Govt. Brief, p. 21), Schwimmer's new testimony tends to exculpate petitioner and to confirm completely petitioner's own trial testimony. See Petition, pp. 9-11.